Supreme Court, U.S.
FILED
95 • 878 OCT 17 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTICS CO., INC., AND MICHAEL LADNEY,

Petitioners,

v.

UNITED STATES OF AMERICA, Frank J. Kelley, Attorney General for the State of Michigan, ex rel.; Michigan Department of Natural Resources Commission; Gordon E. Guyer, Director of the Michigan Department of Natural Resources,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioners, Production Plated Plastics ("PPP"), Michigan City Plastics ("MCP") and Michael Ladney, by and through their attorneys, Law, Weathers and Richardson, P.C., of Grand Rapids, Michigan submit the following issues for Supreme Court review:

1. Does the United States Constitution's Fifth Amendment Due Process Clause require that a punitive fine be based solely on an individual's actions or inactions? Specifically, does the imposition of a $1.5 million "joint and several" fine on a corporate officer and two corporations violate Due Process when not based solely on their individual culpability for a RCRA[1] violation?

2. The United States Constitution's Eighth Amendment prohibits all excessive punitive fines and requires such fines to be proportional and fairly reflective of the offense's gravity. Does the Eighth Amendment restrict RCRA fines, or is any RCRA fine that is within the statutory limit legally permissible?

3. In its history, the Western District Court of Michigan has never previously fined a criminal defendant or individual civil defendant $1.5 million or more. Even if Mr. Ladney had willfully and criminally violated RCRA, he could not be fined more than $250,000. Mr. Ladney did not willfully or criminally violate RCRA. He did not know of RCRA or the corporate violation before being sued. He could not have known about his personal liability at the violation time because the

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[1] Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

first published case anywhere in the country finding personal liability for a corporate RCRA violation was issued a year after. He did not personally profit from the RCRA violations. He reasonably believed that compliance with a state court ordered closure plan would satisfy environmental regulations on the site. Once he was found personally liable he promptly spent $3 million of his personal assets to remove all RCRA regulated waste from the site. The Company he headed funded a groundwater remediation program that abated any contamination prior to the removal of the RCRA waste. His present income is limited to less than $150,000 per year. Under such facts, is a $1.5 million personal fine excessive?

4. Common law concepts are only abrogated upon express legislative intent. Nothing in RCRA, its legislative history or its regulations suggests an intent to abrogate the limited liability of corporate officers for corporate violations. And, nothing in RCRA, its legislative history, or its regulations establishes standards for corporate officer liability. Did Congress intend corporate officers to be jointly and severally liable for the corporation's RCRA violations under diverse legal standards to be set by each trial court?

LIST OF PARTIES

Pursuant to Sup.Ct.R. 14.1(b), the following are parties in this action:

Respondents: UNITED STATES OF AMERICA, Frank J. Kelley, Attorney General for the State of Michigan, et rel.; MICHIGAN DEPARTMENT OF NATURAL RESOURCES COMMISSION; GORDON E. GUYER, Director of the Michigan Department of Natural Resources

Petitioners: PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTICS CO., INC., and MICHAEL LADNEY.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Production Plated Plastics, Inc., Michigan City Plastics, Co., Inc., and Michael Ladney, by and through their attorneys, Law, Weathers & Richardson of Grand Rapids, Michigan, hereby petition the Court for a writ of certiorari.

JURISDICTION

Petitioners submit that this Court has jurisdiction to review the issues presented in this case for the following reasons:

1. The Respondent, United States, originally brought this action pursuant to Sections 3308(a) and (g) of RCRA, being 42 U.S.C. § 6928(a) and (g). Respondent State of Michigan brought this action pursuant to Section 7002(a) of RCRA, being 42 U.S.C. § 6972(a), as well as Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), being M.C.L. 299.548. Accordingly, the United States District Court for the Western District of Michigan, Southern Division had jurisdiction over this case under 28 U.S.C. § 1331, § 1345, and § 1355.

2. On September 4, 1992, March 4, 1993, and April 24, 1993, the District Court entered a final judgment and related orders, disposing of the claims with respect to all of the parties in this appeal. Petitioners did not receive notice of the entry of the final judgment until June 18, 1993. Pursuant to an order of the District Court on July 20, 1993, reopening the time for appeal, Appellant filed a timely Notice of Appeal on July 28, 1993. Accordingly, the Petitioners' appeal to the 6th Circuit Court of Appeals was timely. *See* 28 U.S.C. § 2107, Fed.R.App.P. 4.

3. The Sixth Circuit affirmed the District Court's penalty, additional RCRA relief, and appointment of a receiver in a per curiam opinion released on July 19, 1995. Accordingly, the present petition for writ of certiorari is timely and the Supreme Court has jurisdiction to accept the issues presented

for review pursuant to 28 U.S.C. § 2101, 28 U.S.C. § 2106, and Fed.R.App.P. 13.

STATEMENT OF CASE (FACTS)

Petitioner, Michael Ladney is a 77-year-old resident of Florida who is a self-made industrialist. Petitioners PPP and MCP are corporations affiliated with the Detroit Plastic Molding Company ("DPM"). Michael Ladney started DPM in 1946 as a small plastic molding shop. DPM was an automotive supplier headquartered in Detroit. DPM was successful during the 1960's and 1970's, purchasing and operating eleven plastic manufacturing plants across the midwest and in Canada, including plating operations at PPP, Ft. Wayne, Indiana and at a Canadian site. (Ladney at TR 1062-69).

Amerace Corporation, which was not affiliated with the DPM Group, built the Richland, Michigan plant at issue in 1966. (Evans at TR 855). Richland, Michigan is located approximately 150 miles from Detroit. Amerace operated a chrome plating facility on the site. Since the Richland plant is located in a rural area without city sewer, Amerace built surface impoundments for the chrome plating waste.

On April 4, 1969, Amerace closed down its operations, idling 200 workers. DPM formed PPP and it purchased the Richland plant on June 4, 1969. (Ladney at TR 1070-71). Initially, only five workers were employed making automobile parts, although in subsequent years employment levels exceeded 400 employees. (Evans at TR 856-57).

The plating process involves liquid or hexavalent chromium. After the plating, the excess chrome is rinsed off of the parts with process water. This slurry or "drag-out" is treated with chemicals, principally sulfates, causing the liquid metals including hexavalent chromium to chemically convert ("precipitate") to trivalent chromium which is chrome in a more elemental, inert form. Trivalent chromium, although considered a hazardous waste, is not dangerous to health or a major threat to the environment. (Evans at TR 860-63).

The chemical treatment process causes a sludge to develop, although the remaining process water contains some

trivalent chrome as well as element nickel and element copper. By MDNR authorization and direction, the sludge and the process water was deposited in the impoundments where, according to prevailing scientific and engineering wisdom, there would be no further risk to the environment since only clean water could filter through the sludge. (Evans at TR 865, 873).

PPP's waste disposal system and practices were closely monitored by the Michigan Department of Natural Resources ("MDNR"). The MDNR required and issued a surface water discharge permit to PPP for the discharge of its process water into the impoundments system. (See Trial Exhibit F). At no time through out the penalty period was this permit denied, revoked or rescinded by the MDNR or USEPA. (Evans at TR 865, 873).

In 1977, after the discovery of hexavalent chrome in the groundwater around the plant, the State of Michigan sued PPP under the State's Water Resources Conservation Act. (Evans at TR 866). Because the amount of hexavalent chromium discovered in the groundwater exceeded the minute amounts found in the impoundment sludge or process water, PPP officials did not suspect that the impoundments were the source of the pollution. (Evans at TR 867-68). The MDNR shared the Company's conclusion that the groundwater contamination was coming from the plant, not the surface impoundments. (Evans at TR 868). Nevertheless, the Company and MDNR decided to close the impoundments as part of a general plant upgrade and remediation.

In 1978 the MDNR, PPP and the State Circuit Court agreed to the basics of a plan that would remove all waste on the site and remediate its environmental problems. (See Exhibit A.1).

PPP, over the next eleven years, followed the State Court Closure Plan, including state-approved amendments to the plan:

> A. PPP immediately provided clean drinking water to neighboring land owners at a cost of approximately $50,000, by providing new wells into

a deeper aquifer unaffected by the pollution. (Evans at TR 874-75).

B. After entry of the consent order in 1978, PPP disposed of all subsequently generated sludge off-site. (Evans at TR 868-69).

C. PPP transported sludge from the site on a monthly basis from 1982 through the summer of 1989 at a total cost in excess of $1,000,000. (See Exhibit 215).

D. PPP expended over $160,000 to extend the public sewer 1.7 miles to the PPP plant. (Evans at TR 879-87; Evans at TR 902).

E. PPP retained Keck Hydrogeological Consulting Services in 1978 as requested. (Evans at TR 882). Keck has installed 50 monitoring wells in the area, performed numerous studies, and installed a groundwater purge system. (Evans at TR 882). PPP also began providing quarterly groundwater monitoring reports from 1978 onward (Evans at TR 882).

F. In 1991, to remove all remaining sludge on the site, PPP expended over $2,500,000. (Exhibit P). Its contractor worked almost 3 months processing the removed sludge working 24 hours a day, 7 days a week. (Evans at TR 917). 99.9% of the remaining sludge was removed and disposed of at a licensed landfill. (Evans at TR 918). The rest has largely been removed by hand in the year subsequent. (Evans at TR 918).

G. The last year PPP made any profit was 1984. (Evans at TR 915). Despite going out of business in 1989 and losing money in each of its last 5 years, PPP paid in excess of $7.5 million dollars on the clean-up, and in total has spent $9 million dollars on these costs. (Exhibits S, T and U).

PPP submitted the requisite filings in 1980 to obtain interim status under RCRA for its surface impoundments. In 1985, under RCRA's national implementation schedule, PPP had to submit Application Part B, namely adequate financial

assurances, to obtain a license since interim status was expiring. PPP could not obtain the requisite insurance or closure bond to meet the financial assurances required under RCRA rules. For this reason alone, PPP lost its interim status in November 8, 1985.

PPP submitted a "Piled and Buried Sludge Closure Plan" and subsequent revisions with the United States EPA and the DNR on March 26, 1986; October 24, 1986; and July 29, 1987. Defendant PPP also filed a "Tentative Surface Impoundment Closure Plan" and subsequent revisions with either the USEPA or DNR on May 20, 1986 and February 25, 1987. In December of 1990, PPP submitted an Amended Closure Plan for Surface Impoundments and Buried Piled Sludge, which included necessary updates to accommodate changes on the site.

The MDNR approved the Amended Plan in August of 1991. In the summer of 1991, due to a one-time windfall licensing agreement, a patent Company associated with Mr. Ladney loaned him $1.3 million that along with a 1.5 million MCP tax return funded the sludge removal and development of a full RCRA groundwater monitoring plan. OHM, a nationally prominent hazardous waste excavation and processing firm, was retained. OHM worked 24 hours per day, seven days per week for over three months. (Evans at TR 917-18). The waste was slurried, then pumped and treated through presses and stabilization processes. Thereafter the waste was trucked to Wayne Disposal in Detroit. Although 2,000 yards of contaminated bottom and side soils remain to be removed, all impoundment and piled sludge has been removed.[2]

In an opinion on May 14, 1990, the Federal District Court for the Western District of Michigan granted summary disposition to the governmental plaintiffs under F.R.Civ.P. 56. The court found that PPP had violated RCRA's requirement to

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[2] The Trial Court reached its liability findings on May 14, 1990. See *United States* v. *Production Plated Plastics, Inc.*, 742 F.Supp. 956 (W.D. Mich. 1990). It awarded permanent injunctive relief on January 24, 1991. See *United States* v. *Production Plated Plastics, Inc.*, 762 F.Supp. 722 (W.D. Mich. 1991), *aff'd*, 955 F.2d 45 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 67 (1992).

submit a closure plan within 15 days of the loss of interim status and to complete partial and final closure activities within 180 days after the State's approval of the closure plan. (App. 32).

The District Court also held that RCRA imposes personal joint and several liability on corporate officers and employees who "actually make corporate decisions", apparently irrespective of whether such decisions relate to hazardous waste management. (App. 33).

Under its enumerated standard, the District Court found Mr. Ladney liable because there is a "natural and reasonable inference that he had, as PPP's President, an important say in or actually made the corporate decisions." (App. 34). The District Court also relied on an Affidavit of Mr. Ladney which the court believed had been submitted in the present case, although it actually had been submitted in the state court case. The District Court interpreted this affidavit as containing an assertion by Mr. Ladney that he had ultimate decision-making authority, although no such assertion is contained in the Affidavit. Finally, the court relied on the deposition testimony of PPP's environmental specialist, Steve Noble, wherein he indicated his belief that Mr. Ladney was a corporate officer of PPP and that he was in daily telephone contact with the plant's manager, Mr. William Evans. (App. 34).

The District Court in a January 24, 1991 Opinion, granted the governmental plaintiffs' request under F.R.Civ.P. 56 for permanent, mandatory injunctive relief compelling the defendants to remove the hazardous waste on the site within 180 days, establish a groundwater monitoring plan and establish a post-closure plan.

In a two page per curiam opinion issued on February 20, 1992, the Sixth Circuit Court of Appeals affirmed the District Court rulings without discussion or analyzing the personal liability issues. The Sixth Circuit drew no status distinctions between the defendants. After the federal government argued

that the matter was not final, this Court denied Mr. Ladney's petition for a writ of certiorari.

After an August 1992 trial on penalties and further RCRA compliance relief, the District Court issued a September 4, 1992, Opinion and Order directing that the Petitioners jointly and severally implement a $2.4 million supplemental groundwater monitoring program, even though the groundwater is being monitored, analyzed and purged pursuant to state court order. The Court also fined the Petitioners, jointly and severally, $1.5 million, and directed that a "trustee" be appointed for purposes of marshalling assets.

The Petitioners appealed to the United States Sixth Circuit. Despite another panel's concurrent conclusion that Congress did not intend to abrogate the limited liability of the corporate form, the Sixth Circuit Court of Appeals affirmed the imposition of further personal RCRA liability. Questioning whether the United States Constitution had any relevance to the issue, the Sixth Circuit found the $1.5 million fine justifiable because RCRA would have authorized a fine over $90 million based on RCRA's authorization of up to a $25,000 a day penalty. The Court also affirmed the appointment of a personal "trustee."

To date, the personal "trustee" has incurred over $750,000 in fees and costs while failing to marshall any assets whatsoever.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTIONAL AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

U.S. CONSTITUTIONAL AMENDMENT VIII.

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pursuant to Fed.R.App.P. 14.1(f), the Petitioners cite the following provisions of RCRA which form the basis for the liability and penalties imposed:

> Not later than 18 months after October 21, 1976, the administrator shall promulgate regulations requiring each person owning or operating a facility for the treatment, storage or disposal of hazardous waste identified or listed under this Sub-chapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in Section 6930 of this Title and upon and after such date the treatment, storage or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

42 U.S.C. § 6925(a);

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon

> conviction of violation of this subsection, be subject to a fine of not more than $1,000,000.

42 U.S.C. § 6928(e);

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

42 U.S.C. § 6928(g).

The USEPA has promulgated rules defining the terms "operator" and "owner" as follows:

> "Operator" means the person responsible for the overall operation of a facility.
>
> "Owner" means the person who owns the facility or part of a facility.

40 C.F.R. § 260.10.[3]

ARGUMENT

INTRODUCTION

At present, in the Western District Court of Michigan, the issue of whether a corporate officer is personally liable for corporate environmental violations depends upon which judge is drawn. One judge refuses to impose liability unless the corporate officer

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[3] Mr. Ladney also has been summarily adjudged personally liable under Michigan Hazardous Waste Management Act ("HWMA"), M.C.L. 299.548. In all material ways, this state statute mirrors RCRA. For example, M.C.L. 299.55(l) defines "operator" as " . . . the person responsible for the overall operation of a disposal, treatment, or storage facility with approval of the director either by contract or license." Moreover, the rules promulgated by the MDNR under the HWMA provides the following definitions:

> "Operator" means the person responsible for the overall operation of the facility.
>
> "Owner" means the person who owns a treatment, storage or disposal facility or part of such a facility, including the title holder of the land in which the facility is located.

1985 AACS R299.9106(d) and (e).

has engaged in behavior that would subject him or her to common law tort liability.[4] One judge will impose liability only if the officer "actively participated" in the violative behavior.[5] Another judge will find liability if an officer had the "ability to control" the violative corporate behavior, even if he or she did not actually participate.[6] The judge in the present case imposes liability merely because of an officer's status, the broadest possible paradigm.

Mr. Ladney would certainly like this Court to accept the personal liability issue for review in order to end these vagaries and determine, once and for all, whether Congress intended corporate officer liability under RCRA and CERCLA, and if so, under what standard. However, even if this Court should decline to accept this statutory interpretation issue for review, it should nevertheless review the Constitutional implications of the District Court's extension and Circuit Court's affirmation of the "joint and several" concept to punitive fines.

On this score, Mr. Ladney firmly maintains that, even if he is liable for the company's RCRA compliance, the United States Constitution's Fifth Amendment Due Process Clause required the Trial Court to separate his actions or inactions from those of the corporate defendants and to base any penalty against him solely on his own behavior. Stated conversely, the District Court denied Mr. Ladney Fifth Amendment Due Process when it lumped his behavior together with the corporations' behavior in order to justify the largest fine ever assessed in the Western District of Michigan. Unless this issue is accepted for review and reversed, trial courts across the land will likely follow this disturbing and

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[4] *Kelley ex rel Michigan Natural Resources* v. *Tiscornia*, 827 F.Supp. 1315 (W.D. Mich. 1993).

[5] *CPC International, Inc.* v. *Aerojet-General Corp.*, 777 F.Supp. 549 (W.D. Mich. 1991), *rev'd in part*, 59 F.3d 584 (6th Cir. 1995).

[6] *Kelley* v. *Arco Industries*, 723 F.Supp. 1214 (W.D. Mich. 1989).

dangerous precedent of "fine by association," a practice absolutely at odds with western jurisprudential notions of individual fairness and responsibility.

I.

The District Court Violated the Fifth Amendment's Due Process Requirements by Refusing to Evaluate the Petitioners' Actions Individually And Assessing a $1.5 Million Fine Against the Petitioners on a Joint and Several Basis

While courts have found joint and several liability for RCRA compliance,[7] penalties should be assessed separately and not jointly and severally.[8] Because courts have never assessed fines on a joint and several basis outside of the environmental context, no court has directly tackled the issue raised here on appeal. However, by clear implication, cases explaining the requirements of the Fifth and Fourteenth Amendments (Due Process Analysis), and Eighth Amendment (Excessive Punishment Analysis) require that a court analyze behavior individually when assessing a penalty sought by the government that amounts to punishment.[9]

For instance, in *Solem* v. *Helm*,[10] this Court held that the Eighth Amendment excessive fine analysis requires the trial court to examine the "culpability of the offender." And, in

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[7] Petitioners continue to challenge this finding on appeal and incorporate by reference all previously raised arguments against such a finding here.

[8] Admittedly, several cases have found joint and several liability for RCRA penalties. *Cf. United States* v. *Env. Waste Control*, 710 F.2d 1172 (N.D. Ind. 1989); *United States* v. *Vineland Chemical*, 31 E.R.C. 1720 (D.C. N.J. 1990). As is typical with environmental case law, neither of these cases contains an analysis to justify such a ruling.

[9] The Fifth Amendment Double Jeopardy Clause would also demand an analysis of individual behavior. *See United States* v. *Halper*, 490 U.S. 435, 447 (1989) ["This constitutional protection (Fifth Amendment) is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions on the individual by the machinery of the state."] The Double Jeopardy Clause would be directly implicated in this case if the Respondents seek an additional criminal fine against the Petitioners.

[10] 463 U.S. 277, 293 (1983).

Daniels v *Williams*,[11] this Court stated that "the touchstone of due process is protection of the individual against arbitrary action of the government."

The fact that an important remedial statute and conscientious governmental officials are involved does not lessen Constitutional protections. This Court has noted that due process was designed to protect the rights and property of the vulnerable citizenry from the overbearing concern that may characterize praiseworthy governmental action no less, and perhaps more, than when it is poorly motivated.[12]

The Sixth Circuit Court of Appeals characterized as "novel," Mr. Ladney's suggestion that due process prohibits the federal courts from fining an individual for someone else's behavior.[13] Mr. Ladney gainsays that to a person, the Constitutional framers would have thought novel the Sixth Circuit's suggestion that the Constitution permits a fine against one person for the actions of another.[14]

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[11] 474 U.S. 327, 331 (1986).

[12] *Cleveland Board of Education* v. *Le Fleur*, 414 U.S. 632 (1979).

[13] App. 7.

[14] Respondents will rest their argument on the allegation that the Petitioners are "inseparable" and thus incapable of receiving an individual analysis. This position is factually insupportable. The Respondents have never properly pled that Mr. Ladney is the alter ego of MCP or PPP. To do so would have subjected them to Rule 11 sanctions. To pierce the corporate veil and establish that corporations are the alter egos of the shareholders, a trial court must find fraudulent intent by the incorporators after considering such factors as (1) undercapitalization of the corporation; (2) failure to maintain corporate books; (3) failure to separate corporate and individual finances; (4) use of the corporation to support fraud or illegality; (5) failure to honor corporate formalities, and (6) that the corporation is merely a sham. *Laborers' Pension Trust Fund* v. *Weinberger Homes*, 872 F.2d 702, 705 (6th Cir. 1988).

While the District Court concluded that some of Mr. Ladney's Assets were "commingled" with those of his corporations, and assets within the corporate group "were channeled wherever they were needed without regard to corporate form," it made no factual findings to support these conclusions. Perhaps the District Court was referring to Mr. Ladney's pledge of his patent income to pay the Michigan National Bank revolving credit line. However, the practice of corporate shareholders "investing" or "loaning" money to corporations in which they have an interest is common to virtually every close corporation. Moreover, the record

Unfortunately, the District Court in this case made absolutely no effort to look at the Petitioners' behavior individually, but instead lumped them together. Indeed, the District Court exclusively used the plural form of "defendant" or the plural pronoun "they" throughout its penalty analysis. (App. 76-80).

The District Court's penalty rationale completely breaks down if the Petitioners' behavior is examined individually. For instance, the Petitioners were fined for failing to establish a $3.5 million RCRA closure trust fund, $2.4 million supplemental groundwater monitoring trust fund, and $600,000 in remaining closure costs. Of those amounts, the latter two remained to be funded at trial. Yet, as of that date the District Court found that PPP had no assets[15] and MCP's only asset was its empty plant in Michigan City, Indiana which the Court valued at $1.4 million [although it has since been lost to back taxes] (App. 73).[16] The District Court proceeded to fine PPP and MCP $1.5 million because "they" have repeatedly claimed an inability to finance RCRA compliance when it is clear that "they" have the funds "readily available" (App. 77) to finance the remaining $3 million in RCRA compliance costs. (App. 78). These findings are internally inconsistent.

Similarly, the District Court premised its penalty for PPP's 1985 failure to expend $3.5 million on the closure trust fund on a finding that while PPP did not have such funds at the

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undeniably demonstrated that a strict accounting was applied to record these transactions and separate Mr. Ladney's interests in these funds. This accounting took the recognized form of a shareholder loan account, which in Mr. Ladney's case totaled in excess of $6.5 million dollars.

[15] PPP Plant Manager William Evans' testimony that PPP at no time during the relevant period had $2.3 million available for the RCRA Closure Trust Fund was not challenged. (Evans at TR 1113).

[16] The MCP plant could not be sold because of its own pollution problem and since trial, title to the MCP plant has reverted to the state of Indiana because MCP has lacked any revenue to pay property taxes for several years. (Ladney at TR 1113).

time, Mr. Ladney could have sold his Canadian property for this amount. (App. 73). However, unlike PPP, there is no reason to believe that Mr. Ladney knew or should have known that he had an obligation to liquidate his property in 1985 to meet PPP's obligation. Moreover, the District Court overlooked the testimony of the governments' own real estate expert who acknowledged that there is no present market for Mr. Ladney's industrial property. (Tapping at TR 529).

The Court broadly swept the Petitioners into "one" interchangeable entity, ignoring flesh, blood, different states of corporation, and the historical development of the law. However, if Constitutional due process is to protect the "vulnerable individual" from the overbearing efforts of the government, these distinctions had to be observed and each Petitioner is entitled to have his or its individual behavior and culpability evaluated. The District Court's failure to perform that analysis denied each Petitioner his or its Constitutional rights to due process. This is an important issue of federal law that has not been, but should be, settled by this Court warranting review under Fed.R.App.P. 10.1(c).

II.

The District Court's Fine of $1.5 Million Was Subject to the Eighth Amendment's Prohibition Against Excessive Fines

A penalty that serves the purpose of retribution and deterrence is "punishment" for constitutional purposes regardless of whether the penalty is rendered in a criminal or civil case. Once considered punishment, a penalty is subject to the Eighth Amendment's prohibition against excessive fines.[17]

RCRA has separate remedial sections, and indeed, in this case the Defendants have been ordered to completely remediate the site jointly and severally. Since fines under RCRA are exclusively punitive, they are fully subject to the Eighth Amendment's prohibition against excessive fines, requiring a thorough Eighth Amendment analysis.

Once again, however, the District Court and the Sixth Circuit Court of Appeals want to deny the relevance of the

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[17] *United States* v. *Halper*, 490 U.S. 435, 447-448 (1989).

Constitution to the issue. In fact, the Sixth Circuit expressly stated that it was not conceding the applicability of the Eighth Amendment to a RCRA fine.[18] As a result, neither the District Court nor Sixth Circuit gave anything but cursory consideration to the possibility that the $1.5 million fine, the largest penalty in the Western District of Michigan's history, could be excessive.[19]

This Court should review this case because this issue too raises an important federal question that has not been, but should be, settled by this Court, justifying review under Fed.R.App.P. 10.1(c).

III.

The $1.5 Million Fine Is Excessive

The failure of the District Court and Sixth Circuit to give the penalty issue a full Eighth Amendment review resulted in a fine so disproportional to the offense as to call for an exercise of this Court's power of supervision, warranting review under Fed.R.App.P. 10.1(a).

If applicable, the Eighth Amendment requires that a fine be "proportional to the gravity of the offense relative to other offenses of the same and different types." Since the United States Supreme Court's decision in *Solem*, 463 U.S. 277 (1983), trial courts have operated under common parameters in evaluating Eighth Amendment "proportionality." Justice O'Connor recently expressed the general test as involving three separate elements: some deference must be given to legislative prescriptions; the court should examine the gravity of the defendant's conduct and the harshness of the remedy; and, third, because this remedy is punitive in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct and the

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[18] (App. 10).

[19] The Sixth Circuit's holding in the present case is inconsistent with its opinion in *United States* v. *Ekco Housewares, Inc.*, No. 94-3268 (August 16, 1995), where the court reversed a fine as being excessive.

civil and criminal sanctions imposed by different jurisdictions for the same or similar conduct.[20]

A. Exclusive Deference Cannot be Given to a Statute That Would Fine Petitioners $92 Million for Being Financially Unable to Set Aside $3.5 Million and That Would Cap the Fine for a Criminal Violation at One-Sixth The Civil Penalty Assessed

In assessing the value of the fine, the District Court was certainly obligated to give some deference to RCRA's $25,000 per day maximum. However, here this "cap" is so illusory, it is meaningless. After all, the governmental plaintiffs themselves are quick to point out that RCRA's penalty provisions alone would support a $92 million fine, even though the Petitioners' inability to post a $3.5 million bond produced the violation. Moreover, although ignored by the District Court, the statutory cap for criminal violations for knowing endangerment of human health is capped at $250,000. See 42 U.S.C. § 6928(2)(B).

In the present case, no scienter whatsoever was ascribed to the RCRA violations, and could not be ascribed to Mr. Ladney, since his "violation" occurred thirteen months before the first case was rendered which held corporate officers liable under RCRA.[21] Furthermore, no sludge was deposited on the site during the penalty period; no human threat was present because clean water was provided to the neighbors;

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[20] *Browning-Ferris* v. *Kelko Disposal*, 492 U.S. 257, 300-301 (1989) (J. O'Connor concurring and dissenting).

[21] The Court did make a finding of "bad faith" rather than scienter. However, the only "bad faith" found allegedly occurred because the Petitioners in the Court's view failed to raise money for RCRA compliance *after* it found them liability. In this regard the Court completely ignored his finding that Mr. Ladney spent $2.4 million dollars personally to remove all the hazardous sludge from the site after the liability finding **but before his appeal had even been heard**, as well as the undisputed testimony that he tried to escrow the "first funds" from the sale of the DPM Group in 1990, although his efforts were defeated by his ex-wife. (Driggers at TR 1218-38).

and any on-going contamination to the groundwater caused the presence of the wastes was being remediated by the existing groundwater purge and treat system.

If a RCRA violation that knowingly endangers human health can be the subject of only a $250,000 fine, a civil fine greater than that amount can be justified only for an unknowing, nonhealth endangering violation if the violator profited by the violation in an amount greater than $250,000. This is clearly not the case here. In fact, there was no evidence at trial that Mr. Ladney drew a salary or made any money personally from PPP's operations, and the evidence demonstrated that his assets and income during the relevant period of time were developed from non-PPP related sources. Indeed, it is undisputed that PPP lost $3.5 million during the period of RCRA deficiencies. See Exhibit 215.

While paying lip service to a belief that the fine would serve as a deterrent to other corporate officers, the Court made no effort to relate Mr. Ladney's behavior to this stated objective. Mr. Ladney was assigned liability due to his status as President of PPP with "ultimate decision-making authority," (App. 34). The only "bad mind-set" that the Court found was that after he was found liable he didn't do everything he could to liquidate his property and achieve full RCRA compliance.

What is the message of deterrence being sent under these facts? Surely the Court could not seriously mean to impose a penalty to deter people from assuming a corporate job with ultimate decision-making authority. Nor could the Court rationally try to deter corporate presidents from remaining in office when their company develops a RCRA regulatory problem. Otherwise, the RCRA deficiency will never get resolved because all corporate officers and potential officers will immediately resign and no replacements will be found, paralyzing the corporation.

A deference to the statute – including its intent and fine provisions – even standing by itself, cannot legally support the $1.5 million fine.

B. A "Gravity" Analysis Cannot Support the Fine

An Eighth Amendment analysis cannot stop at statutory considerations. It must also consider the gravity of the offense and its proportionality to other offenses for which the courts issue fines.

Any analysis as to the gravity of the RCRA violations in this case must start with the fact that this case is unique and will never be repeated. By the time RCRA went into full effect on the site in 1985, PPP had already made a corporate decision to close the facilities and was continuing their use until the only feasible alternative sewer hook-up could be achieved. (See Exhibit 203-EPA acknowledgement of these facts).

The District Court heard undisputed testimony from plant manager William Evans that PPP decided in 1978 to begin the phase-out of impoundments, and that from that date forward it ceased all sludge deposits in the impoundments or anywhere else on its premises (Evans at TR 868-69, 881).

As with the sludge, the groundwater was not degradated during the penalty period. It is undisputed that the groundwater contamination was discovered as early as 1977. Thus, it is important to note that the groundwater contamination on the site pre-dates the alleged RCRA violation of November of 1985 by at least eight full years.

Despite this fact, the District Court found that the surface impoundments and buried sludge on the site are a "significant source of the contamination in the aquifer." (App. 67). No witness offered such testimony. No scientific report supports this conclusion. Indeed, the only degreed expert to testify *directly refuted* this finding.

The truth is that, while the surface impoundments may have been a *minor* cause of the groundwater degradation, they were not a significant source of the groundwater contamination. Hydrogeologist Ken Wiley's specific testimony that the impoundments were not a significant source of groundwater

contamination was not disputed,[22] and was supported by the scientific reports dating back as early as 1980.[23]

Moreover, it is undisputed that PPP spent millions of dollars to study and remediate the degradation beginning as much as seven (7) years *before* the first alleged RCRA violation. It installed fifty (50) monitoring wells between 1978 and 1980 (Evans at TR 882) and began purging 250,000 gallons of water a day from up to five (5) purge wells in 1983 (Evans at TR 884), a full two years before RCRA was alleged to have been violated. Hydrogeologist Wiley expressly testified that any contamination entering the groundwater during the period of RCRA violations has been captured by the purge and treat system and that no contamination has apparently escaped this system. (Wiley at TR 971).[24]

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[22] (Wiley at TR 964, 969-70). While MDNR hydrogeologist Susan Peelan testified to her opinion that the impoundments were *a* source of contamination, she offered the court no guidance as to the relative contribution of the impoundments. Significantly, she was *not* called to rebut Ken Wiley's testimony.

[23] The slug of contamination appears to be the result of a *one time incident* in which hexavalent chromium and possibly nickel were allowed to enter the groundwater flow system.

. . .

Based on the information available to us regarding testing of the stockpiled sludge and on our own investigation, the stockpiled sludge does not appear to be contributing to groundwater degradation.

(Exhibit B.4, June 10, 1980 Keck Report, pp 10-12; emphasis added).

[24] Likewise, the District Court lost its perspective on the alleged health risk. The Court found without proof that chromium is a human carcinogen and spent a whole paragraph of its opinion describing its potential adverse health effects in the abstract. (App. 65). Conveniently, however, the Court never moved beyond the theoretical, refusing to acknowledge the undisputed evidence that any human health threat from the PPP site had been eliminated by PPP in 1978 (7 years before the RCRA violation) when it provided clean, deep-water wells to *all* neighboring residents. (Evans at TR 874-75).

Furthermore, Dr. Ronald Waybrant's unchallenged testimony established that the site is fully fenced and that the sludge never rendered airborne because of its water content. (Waybrant at TR 10420. No one has ingested the sludge or any contaminated groundwater. (Evans at TR 875). While dermatitis is a logical concern when one is directly and repeatedly exposed to the sludge, the government's own

A grandfathered operation that isn't continuing, that isn't posing an environmental or health threat and that is being remediated doesn't come close to the gravity necessary to justify a $1.5 million fine.

C. A "Proportionality" Analysis Cannot Support the Fine

In *Solem*, this Court found that offenses should be ranked under an Eighth Amendment proportionality analysis in terms of seriousness given the relative degrees of scienter.[25] Thus, negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts should be ranked in ascending order of seriousness and fines meted out accordingly.

The District Court travelled far beyond all notions of proportionality by fining a 77-year-old man who wasn't negligent, wasn't reckless, wasn't knowing, and certainly wasn't malicious in an amount that exceeds the total of fines meted out by the Western District Court of Michigan to murders, tax evaders, drug dealers, and kidnappers throughout its history of published decisions.[26] Standing alone, this fact justifies a reversal of the fine against Mr. Ladney.

Even if one restricts the proportionality analysis to RCRA fines, however, it is not supportable. The District Court made no effort to compare the penalty in light of any other penalties awarded in the Western District Court of Michigan for similar or different types of conduct. This omission had to be calculated since this same District Judge has issued one of the only two other RCRA penalties ever handed

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expert acknowledged that there is no evidence of any such exposure and no indication that anyone experienced dermatitis or any other health condition as a result of the PPP impoundments, and the governments own expert admitted he did not know anything about the alleged risks on the site. (Venman at TR 383, 385).

[25] *See* 463 U.S. at 293.

[26] Petitioners' counsel performed an exhaustive computer search of all Western District Court of Michigan opinions to reach this conclusion.

down in this District. This penalty in *United States* v. *Lacks Industries*[27] was $250,000, one-sixth of the present penalty and was assessed only on the corporation and not on the individual corporate officers. The same was true in the only other RCRA case, *United States* v. *Allegan Metal Finishing Company*,[28] which resulted in only a $16,000 fine. In truth, Mr. Ladney is the only individual in RCRA history to have personally paid sums of money in order to bring the Company into RCRA compliance.[29] After finding Mr. Ladney liable and recognizing that he had thereafter paid several million dollars of his own funds in order to remove all the hazardous waste sludges on the site, the District Court should have commended Mr. Ladney for precedential effect. It certainly should *not* have fined him, and cannot constitutionally fine him more money that he would have paid if found criminally liable.

Finally, the Court ineptly evaluated the fine's proportionality to the other civil sanctions assessed against the Defendants. Indeed, a fine cannot disable (render financially destitute) a defendant without being *per se* excessive in violation of the Eighth Amendment.[30]

Here, the District Court found that PPP had no assets (App. 73). It further valued its additional RCRA compliance orders at $3 million. With these findings it clearly could not also conclude that a $1.5 million fine against PPP would not disable it from further RCRA compliance.

Likewise, the District Court found that Petitioner MCP's only asset was a $1.4 million dollar plant [subsequently lost for nonpayment of taxes]. How could any court maintain that a fine of $1.5 million against an entity with total assets of

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[27] 32 E.R.C. 1221 (W.D. Mich., Jun 22, 1990) (No. G87-413 CA).

[28] 696 F.Supp. 275 (W.D. Mich. 1988).

[29] In all other RCRA cases involving personal liability, the corporation continued to operate and therefore generated the funds for compliance and penalty payments.

[30] *See Halper, supra.*

$1.4 million is proportionate and nondisabling, especially when it's remaining RCRA compliance relief is $3 million?[31]

IV.

Congress did not Intend to Impose RCRA and CERCLA Liability on Corporate Officers for Corporate Violations

It is undisputed that the District Court and Sixth Circuit Court of Appeals should have re-examined the liability finding against Mr. Ladney if one of three conditions was present; new evidence relevant to the issue was introduced at the subsequent trial; an inconsistent decision was subsequently issued in another case in the district or circuit; or in order to avoid a manifest injustice.[32]

In the present case, each of these *disjunctive* elements is present. The Western District Court of Michigan, out of which this case emanates, reversed itself on the issue, finding that corporate officers are only personally liable under the CERCLA/RCRA construct if they would have been liable under common law for personal tortious acts.[33] And, the Sixth Circuit Court of Appeals recently held that if Congress intended to "sweep away the protections long afforded by the

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[31] Contrast Mr. Ladney's fine with the arguably excessive fine in *Browning-Ferris, supra.* In that case, the defendant was penalized $6 million in the face of its total annual revenues of $1.3 billion. 492 U.S. at 261. Here Mr. Ladney was fined $1.5 million when he has a total income of $150,000 a year. (Ladney at TR 1115). Because the Canadian property is not presently marketable (TR 529), the Court's fine also clearly disabled Mr. Ladney.

[32] *See* Respondents' Brief, p 19 *citing Coal Resources, Inc.* v. *Gulf & Western Ind.*, 865 F.2d 761, 767 (6th Cir. 1989), which cited the 1st Circuit's Decision in *Kori Corp.* v. *Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (1st Cir. 1985).

[33] *Kelley ex rel. Michigan Natural Resources* v. *Tiscornia*, 827 F.Supp. 1315 (W.D. Mich. 1993):

> After reviewing related case law from the Sixth Circuit, Michigan Corporate law, and the various tests employed by the other circuits, the Court finds that the direct control or participation test, which holds individuals accountable for their own tortious acts, is the appropriate standard to be used in assessing operator liability. This standard recognizes that the statute includes as responsible parties those that may be found liable under traditional corporate law principles.

corporate form with respect to limited liability" it should do so expressly.[34]

Under common law standards, Mr. Ladney clearly would not have been liable since it is undisputed that he did not even know about RCRA or the alleged RCRA violations until he was served with the Complaint in this case, and at that time he instructed his in-house counsel to do everything possible to get the Company compliant with RCRA. (Ladney at TR 1100). This testimony was wholly consistent with that of the waste disposal experts at PPP who testified that they had never met nor talked to Mr. Ladney. (See Exhibit C attached to R 73).

Supplementing this change in the law is a fundamental change in the underlying facts, a separate criterion for reconsideration. The *only* rationale offered by the Sixth Circuit in its original per curiam opinion affirming the liability finding in this case was that PPP and Ladney are the "only" parties who can bring about closure of the facility in keeping with RCRA's mandate because of PPP's ownership of the site. (App. 20).

Since the personal liability opinion, the State of Michigan has become the exclusive owner and operator of the site. In fact, the State of Michigan stipulated that the Petitioners have no rights of ownership or any right to access the facility for operational purposes and so *cannot* effect RCRA compliance.[35] Accordingly, the very cornerstone of the Sixth Circuit's Opinion on this issue has been dislodged.

Finally, the liability finding effects a manifest injustice. Here a 77 year-old-man, who was *never* directly involved in the RCRA violations, who gave instructions to take care of them immediately after he was sued, who never profited personally from the operations and who has already paid $2.4 million to remove all the sludge on the site, has been fined more than one $1 million *more* than his current net worth.

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[34] *United States* v. *Cordova Chemical Company of Michigan*, 59 F.3d 584, 590 (6th Cir. 1995).

[35] *See* Reply Appendix, pp 1-2 (emphasis added).

Mr. Ladney, in fact, has never had his alleged personal liability analyzed in a principled or detailed manner for one simple reason: as demonstrated below, such a review could never support such a finding.

The federal courts have uniformly treated liability for individual officers, directors and owners of corporations under RCRA and the Comprehensive Environmental Response Compensation Liability Act ("CERCLA")[36] as subject to the same standards.[37] This commonality springs from the fact that these are the nation's two principal statutes governing the generation, disposal and environmental impact of hazardous substances, and the fact that Congress used the terms "owner" and "operator" as liability triggers in both statutes.[38]

Except in two cases, all federal courts have blindly found the definitions to apply to the infringing corporation and to a variety of corporate employees or shareholders, although efforts to draw distinctions among such personnel has produced a bevy of different judicial and administrative enforcement standards.

These cases all have their genesis in *New York* v. *Shore Realty*,[39] which found shareholder liability based on a form of *a posteriori* logic, rather than a statutory interpretation analysis. Since that case, each federal decision reaching the same result has largely operated on "gestalt" by string citing *Shore Realty* and other subsequent cases relying thereon, rather than performing a statutory analysis. In effect, *Shore Realty*

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[36] 42 U.S.C. § 9601 *et seq.*

[37] *Cf. United States* v. *Northeastern Pharmaceutical ("NEPACCO") Co.*, 810 F.2d 726, 745 (8th Cir. 1986); *Accord, Kelley* v. *Arco Industries*, 723 F.Supp. 1214, 1218 (W.D. Mich. 1989).

[38] *See* 42 U.S.C. § 6925(a) and 42 U.S.C. § 9601(20)(a).

[39] 759 F.2d 1032 (2nd Cir, 1985).

jumped off the cliff into a analytical abyss and subsequent federal courts followed lock step over the precipice.[40]

Only one panel in the Fifth Circuit Court of Appeals and one panel in the Sixth Circuit Court of Appeals have examined the issue using this Court's precedent regarding statutory construction.[41] Such an application leaves *no* room for a conclusion that Congress intended the joint and several liability of corporate employees for the RCRA or CERCLA violations of the corporations for whom they work.

For instance, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[42] This Court has also consistently ruled that courts must interpret statutes and rules according to their plain meaning except in the rare instance where a literal application will produce a result demonstrably at odds with the statute's intent.[43]

RCRA does not define "owner" or "operator" to include corporate officers, employees or shareholders. Indeed, it does not even define these pivotal terms. While RCRA rules define "operator" and "owner", these definitions are plainly cast in the singular sense thereby contra-indicating an intent to confer joint liability on corporate employees:

> 'Operator' means *the* person responsible for the overall operation of a facility.

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[40] This history of *stare decisis* run afoul is well chronicled by commentator Donald B. Mitchell Jr. in "*Joslyn* v. *James*, Returning to the Mainstream of American Law," *Toxics Law Reporter* 1647 (May 22, 1991).

[41] See *United States* v. *Cordova Chemical Company of Michigan*, 59 F.3d 584 (6th Cir. 1995), and *Joslyn Manufacturing Co.* v. *T.L. James & Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988), *aff'd* 893 F.2d 80 (5th Cir. 1990). These cases are CERCLA cases, but since their rationale are uniformly considered applicable to RCRA and given the aforedescribed accepted judicial practice of treating personal liability under the statutes equally they should be considered to be in conflict with the Sixth Circuit Court of Appeals' decision in this case for purposes of Sup.Ct.R. 10 1(a). *See NEPACCO, supra* 810 F.2d 726 (8th Cir. 1986).

[42] *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

[43] *See U.S.* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

> 'Owner' means *the* person who owns a facility or part of a facility.[44]

The USEPA and MDNR presently scoff at the suggestion that "the operator" refers merely to the corporation. Yet, when the USEPA promulgated this regulation it expressly stated this proposition in explaining the definition of "operator." The Agency stated that:

> In the case of a corporation or other business entity, the entity is the 'person' with the privileges and duties.[45]

After promulgating such a ruling and issuing such an explanation, how can the USEPA in enforcement now claim Mr. Ladney presently has duties (though presumably no rights) as another "the person"?[46]

In fact, nothing in RCRA suggests that the USEPA in its rule-making erred by defining these terms in their singular. Likewise, nothing in RCRA's legislative history suggests that

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[44] 40 C.F.R. § 260.10 (emphasis added). Mr. Ladney has also been summarily adjudged personally liable under Michigan's Hazardous Waste Management Act ("HWMA"), M.C.L. 299.548. In all material ways, this State statute mirrors RCRA. For example, M.C.L. 299.55(l) defines "operator" as " . . . *the* person responsible for the overall operation of a disposal, treatment, or storage facility with approval of the director either by contract or license." Moreover, the rules promulgated under HWMA provide the following definitions:

> 'Operator' means *the* person responsible for the overall operation of a facility.
>
> 'Owner' means *the* person who owns a treatment, storage or disposal facility or part of such a facility, including the title holder of the land in which the facility is located.

1985 AACS R299.9106(d) and (e) (emphasis added).

[45] 45 Fed. Reg. 33301 (May 19, 1980).

[46] The Administrative Procedures Act, 5 U.S.C. § 552(a)(1) requires that any federal agency promulgate any substantive rule of general applicability. Rules which are not published in the Federal Register as required by the APA are void and cannot be enforced. *Anderson* v. *Butz*, 550 F.2d 459 (9th Cir. 1977). Assuming that USEPA now interprets "operator" to include corporations *and* corporate officers, it is incumbent upon USEPA to promulgate this interpretation by rule. At a minimum it should advise the American people in the Federal Register that corporate officers can share the *duties* of an operator with the corporation in order to effectively rescind or modify 45 Fed. Reg. 33301.

Congress intended the joint and several liability of corporate officers for the violations of a corporation.[47]

To the contrary, a finding of joint and several liability on corporate officers conflicts with the statutory use of the terms "owner" and "operator" in RCRA itself. This is apparent in 42 U.S.C. § 6925(a), which is the most basic of RCRA requirements and was the RCRA section Mr. Ladney was alleged to have violated. Subsection 6925a obligates "*each* person owning or operating an existing facility . . . to have a [RCRA] permit . . . " (emphasis added). It is absurd to suggest that Michael Ladney in this case, and corporate officers generally, violate RCRA if they do not "each" have a permit separate from the corporation to "own" or "operate" a facility.

This incongruity was recently recognized by a USEPA Administrative Law Judge in *In the Matter of Southern Timber Products, Inc.*, RCRA (3008), Appeal No. 89-2, 6 *Toxic Law Reporter* 1276 (March 18, 1992), when he noted that the EPA has never "permitted" corporate officers nor considered them to be either the "owner" or "operator" until *after* a violation.[48]

The liability finding in this case also violated this Court's defined statutory interpretation rule that "if Congress *intends* for legislation to change the interpretation of a judicially created concept it makes that intent specific."[49]

The *Joslyn* and *Cordova* courts well articulate the argument. The *Joslyn* district court acknowledged the traditional

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[47] The USEPA and MDNR argue that there is precedent for ignoring the plain, singular language of this rule. They refer to *United States* v. *Environmental Waste Control, Inc.*, 710 F.Supp. 1772 (N.D., Ind. 1989). In reality, this case notes in *dicta* how persons in a joint venture or in joint tenancy could jointly be liable as "the person with overall responsibility for a facility." Such a ruling is consistent with common law assignments of liability. Mr. Ladney and PPP, however, are in no such relationship and common law would not assign them joint liability. This is an actual distinction.

[48] *Southern Timber, supra*, pp.17-19 (emphasis and bracketed information added).

[49] *Midlantic National Bank* v. *New Jersey*, 474 U.S. 494, 501 (1986).

doctrine of limited liability of corporate officials for corporate liabilities and noted the failure of Congress to express any intent to abrogate this doctrine in the environmental statutes:

> Based upon the foregoing authorities, this Court holds that the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American Jurisprudence that may not be disregarded absent a specific congressional directive. . . . This court will not read into the statute a provision disregarding decades of corporation law.[50]

Quoting from this Court's holding in *Edmonds* v. *Campagnie Generale Transatlantique*, 443 U.S. 256, 267 (1979), the Fifth Circuit affirmed the district court and refused to extend liability to officers and directors.[51]

This Court's requirement that Congress "speak" if it wants to abrogate "elementary jurisprudential" concepts is especially appropriate for the present issue, because Congress clearly knows how to phrase environmental statutes when it wants liability to be placed upon corporate officers. For example, in the Clean Water Act of 1977,[52] the term "person" triggers liability and is broadly defined to include an individual, corporation, partnership, association, etc. . . . 33 U.S.C. § 1362(5). Nevertheless, Congress does not intend "person" to generally include corporate officers because in the "knowing violations" subsection of the Clean Water Act, and only that subsection, it expressly adds "responsible corporate officer" to the term "person":

> For purposes of this paragraph, the term 'person' shall mean, in addition to the definition contained

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[50] *Joslyn Manufacturing Co.* v. *T.L. James & Co. Inc.*, 696 F.Supp. 222, 226 (W.D. La. 1988).

[51] *Joslyn Manufacturing Co.* v. *T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990) 893 F.2d at 83.

[52] 33 U.S.C. § 1251, *et seq.*

in section 1362(5) of this title any responsible corporate officer.[53]

Likewise, the Clean Air Act notes that for certain limited subsections, "operator" includes "any person who is a senior management personnel or a corporate officer." The statute exculpates engineers, technicians and other employees carrying out their duties if they are not senior management personnel or corporate officers unless the violations are willful and knowing.[54]

If Congress itself recognizes a need in other environmental statutes to further define the general terms "person" and "operator" to include corporate officers in limited liability contexts within those statutes, how can the federal courts presume that Congress intended those same general terms to include corporate officers in broad application throughout RCRA without similar additional language? Stated differently, if "operator" and "person" were intended to make corporate officers jointly liable as the courts in this case have held, then by necessity, the additional, specific language in the Clean Water Act and Clean Air Act is redundant and the restrictions on such joint liability to particular officers or particular instances should be eviscerated from these Acts.

CONCLUSION

Trial courts and the courts of appeals have received no Supreme Court guidelines as to whether corporate officers are liable under CERCLA or RCRA for corporate violations, and if so, under what standards.

Assuming for the sake of argument that corporate officers can be jointly and severally liable, trial courts and the courts of appeal have received no Supreme Court guidelines as to whether the officer can be fined for behavior other than his own in light of the Fifth Amendment's Due Process requirements.

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[53] 33 U.S.C. § 1348(4)(B).

[54] 42 U.S.C. § 7413(h).

Assuming for the sake of argument that corporate officers can be jointly and severally liable, trial courts and the courts of appeal have received no Supreme Court guidance as to whether the full Eighth Amendment excessive fines analysis applies to the environmental fines, or whether every fine is justifiable if within the broad statutory guideline of $25,000 per day.

Because of these uncertainties, decisions run the gamet. Liability and fines worth millions of dollars are assessed wholly on the luck of the judicial draw in the trial court and panel draw in the circuit court of appeals.

Fundamental fairness and statutory integrity should compel this Court to exercise its supervisory responsibility by accepting this case and establishing clear, uniform standards for corporate officer environmental liability and penalties.

Dated: December 1, 1995

Respectfully submitted,

LAW, WEATHERS & RICHARDSON, P.C.
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APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

Nos. 93-2055/93-2618

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, and FRANK J. KELLEY, Attorney General for the State of Michigan *ex rel.*, MICHIGAN NATURAL RESOURCES COMMISSION, and GORDON E. GUYER, Director of the Michigan Department of Natural Resources, Plaintiffs-Appellees, v. PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTIC CO., INC., and MICHAEL J. LADNEY, JR., Defendants-Appellants.	NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit, if cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (Filed Jul. 19, 1995)

BEFORE: JONES, CONTIE, and MILBURN, Circuit Judges.

PER CURIAM. In case No. 93-2055, Defendants Production Plated Plastics, Inc. ("PPP"), Michigan City

Plastic Co. ("MCP"), and Michael J. Ladney, Jr. are appealing the district court's adverse decision to impose permanent injunctive relief and a civil penalty in an environmental enforcement action brought by the Plaintiffs United States and the State of Michigan pursuant to sections 3008(a) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928 (1988), and section 48 of the Michigan Hazardous Waste Management Act ("MHWMA"), Mich. Comp. Laws Ann. § 299.548 (West 1984). The impetus for the enforcement action was the Defendants' alleged failure to comply with federal and state laws governing the proper management of hazardous waste at a treatment, storage, and disposal ("TSD") facility that the Defendants owned in Richland, Michigan. The Defendants raise the following issues for review: (1) whether the district court properly exercised its discretion by imposing a $1.5 million civil penalty on the Defendants, jointly and severally, for violations of RCRA, MHWMA, and related regulations; (1) whether the district court erred in failing to reduce the civil penalty to reflect the Plaintiff State of Michigan's settlement with Defendant Marguerite Ladney, the former wife of Defendant Michael Ladney; and (3) whether the district court erred in requiring Defendants to comply with the RCRA/MHWMA regulations for the creation of a trust fund which will pay the costs for groundwater monitoring during the thirty-year period following the closure of Defendants' hazardous waste facility.

In case No. 93-2618, the Defendants are appealing the decision of the district court to appoint a third-party trustee to expeditiously liquidate whatever assets were

needed to achieve compliance with the Court's injunction. The Defendants claim that the district court lacked the judicial authority or abused its discretion to appoint a trustee/receiver to assist the court in securing Defendants' obedience with the court's order.

We affirm the district court's decisions in both cases.

I.

We need not address the facts of this case or synopsize the scheme of the applicable environmental statutes because the district court has ably accomplished both of these tasks in two previous decisions, *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich. 1990) ("*PPP I*") and *United States v. Production Plated Plastics, Inc.*, 762 F. Supp. 722 (W.D. Mich. 1991) ("*PPP II*"). Instead, we turn to the procedural history of the case because it establishes the context for the present appeals.

This lawsuit has a lengthy procedural history. Initially, on May 14, 1990, the district court determined that the Defendants operated a hazardous waste facility and stored hazardous waste at PPP, an electroplating plant in Richland, Michigan, in violation of RCRA and MHWMA. Awarding partial summary judgment to the Plaintiffs, the district court found the Defendants jointly and severally liable under federal and state environmental statues. *PPP I*, 742 F. Supp. at 963.

On January 24, 1991, the district court, again, awarded partial summary judgment to the Plaintiffs and issued a permanent injunction enjoining the Defendants

to comply with the hazardous waste laws by implementing the terms of a 1988 closure plan approved by the Michigan Department of Natural Resources ("MDNR"). *PPP II*, 762 F. Supp. at 733. That order was later revised to account for the submission by Defendants and approval by MDNR of an amended closure plan. J.A. at 131. This court affirmed both district court decisions in an unpublished opinion, *United States v. Production Plated Plastics, Inc.*, No. 91-1728 (6th Cir. Feb. 20, 1992) (per curiam), *cert. denied*, 113 S. Ct. 67 (1992).

PPP II left four issues for resolution at trial: (1) whether an injunction should issue against Defendants requiring them to comply with the groundwater monitoring requirements of 40 C.F.R. Part 265 Subpart F; (2) whether an injunction should issue against Defendants requiring them to provide financial assurances for closure and post-closure in accordance with 40 C.F.R. §§ 265.143 and 265.145; (3) whether an injunction should issue against Defendants requiring them to comply with the financial responsibility (liability) requirements of 40 C.F.R. § 265.147; and (4) whether, and in what amount, a civil penalty should be assessed against Defendants pursuant to 42 U.S.C. § 6928(g). J.A. at 131. The first issue left for trial was resolved by the court's Revised Order of Permanent Injunction, which required Defendants to undertake the groundwater monitoring required by RCRA and included in their amended closure plan. Another issue for trial arose, however, in that the Defendants failed to comply with the district court's Revised Order of Permanent Injunction.

The district court proceeded to trial on the remaining issues and on September 4, 1992, after a two-week trial,

the court ordered the Defendants to do the following: (1) achieve complete closure of the Richland facility pursuant to all terms of the approved closure plan within ninety days; (2) comply with post-closure requirements as set forth in 40 C.F.R. Part 265 and analogous Michigan regulations; (3) provide financial assurance for performance of the closure obligations and post-closure obligation; (4) implement and comply with the alternate groundwater monitoring program approved in the Revised Order of Permanent Injunction; and (5) utilize best efforts to obtain the required financial liability coverage. J.A. at 150-51. The court also held that if the Defendants were not in compliance with the court-ordered injunctive relief within ninety days, the court would appoint a trustee to "manage all the business affairs of the defendants and . . . to expeditiously liquidate whatever assets are needed to achieve compliance with the Court's injunction." J.A. at 152-53.

Finally, because of the Defendants' refusal to comply with RCRA and MHWMA, the court imposed a civil penalty of $1.5 million, which the court found was "in line with those imposed in numerous other environmental cases." J.A. at 148. The Defendants raised an Eighth Amendment defense to the assessment of the civil penalty, and they also averred that the penalty should have been offset by $60,000, which Ladney's ex-wife paid the Plaintiffs in settlement of their lawsuit against her arising from these same circumstances. J.A. at 147-48. The district court held that the fine was not per se unconstitutional and that it was not excessive. J.A. at 148. Regarding Mrs. Ladney, the court refused to *pro rata* reduce Defendants' penalty to account for her settlement with the Plaintiffs

because she was never adjudicated to be liable for the RCRA violations and because the Ladney's judgment of divorce required Mr. Ladney to hold Mrs. Ladney harmless for the pollution problem at the Richland facility. *Id.* at 148-49.

After the district court's ruling of September 4, 1992, the Defendants did not liquidate sufficient assets to finance the remaining compliance activities within ninety days. Thus, on December 10, 1993, the district court designated a third-party trustee to identify selected assets, to Marshall and liquidate those assets, and to deposit the proceeds into an Escrow Trust Fund from which the work necessary to comply with the injunction would be paid. J.A. at 191. These appeals followed.

II. Imposition of Civil Penalty

As an introductory matter, the Defendants note that they are not only contesting the district court's decision to impose joint and several liability for the civil penalty but they are also rechallenging the district court's earlier finding of joint and several liability for RCRA compliance in *PPP I.* PPP Br. at 9 n.2, 44-45. This court previously decided the latter issue on appeal in a per curiam opinion. *United States v. Production Plated Plastics, Inc.*, No. 91-1728 (6th Cir. Feb. 20, 1992). Accordingly, we find that the law of the case doctrine precludes reconsideration of this issue. *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 954 F.2d 1263, 1265 (6th Cir. 1992) (citing *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 767 (6th Cir. 1989) (quoting *Kori Corp. v. Wilco Marsh*

Buggies & Draglines, Inc., 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985)).

With regard to the district court's decision to impose on the Defendants a $1.5 million RCRA civil penalty, jointly and severally, the Defendants argue that the district court abused its discretion because the decision violated the Fifth Amendment (Due Process Clause) and the Eighth Amendment (Excessive Fines Clause) and because the court based its assessment on clearly erroneous factual findings. The assessment of a civil penalty under RCRA is "committed to the sound discretion of the trial court, and will be reversed only upon a showing that the district court abused its discretion." *United States EPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 335 (7th Cir. 1990) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975)), *cert. denied*, 499 U.S. 975 (1991).

A. Due Process Argument

The Defendants claim that case law explaining the requirements of the Fifth Amendment Due Process Clause implies that a court should analyze behavior individually, instead of jointly and severally, when assessing a penalty sought by the government, which amounts to punishment. PPP Br. at 10 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Solem v. Helm*, 463 U.S. 277, 293 (1983)). The Defendants' efforts to constitutionalize this issue are novel, evidenced by the fact that the cases that the Defendants cited in support do not even remotely discuss the issue in this case. On the other hand, the Defendants admit that several courts have imposed joint

and several liability for RCRA civil penalties pursuant to 42 U.S.C. § 6928(g). PPP Br. at 10 n.3 (citing *United States EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1245 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *United States v. Vineland Chemical Co.*, 31 Env't Rep. Cas. (BNA) 1720 (D.N.J. 1990), *aff'd*, 931 F.2d 52 (1991)).

Even assuming the possibility that a court's evaluation of the relevant factors for imposition of a civil penalty, *see United States v. T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D.S.C.), *aff'd in part*, 865 F.2d 1261 (4th Cir. 1988), could lead it, in the face of meaningful differences, to tailor the penalty for each individual RCRA violator, we do not believe such a determination would have been appropriate in this case. The district court found that PPP and MCP were part of a group of companies that was largely owned and completely controlled by Ladney "as a single corporate entity." J.A. at 132. Ladney's personal assets were "comingled" with those of his corporations, and assets within the corporate group "were channeled wherever they were needed without regard to corporate form". *Id.* Although the Defendants contest the district court's factual findings, the district court's conclusion that the Defendants functioned as one entity was clearly permissible, based on the evidence. Thus, the court did not abuse its discretion and violate the Due Process Clause when it imposed joint and several liability on the Defendants for the civil penalty.

B. Excessive Fines Argument

The Defendants also claim that the civil penalty of $1.5 million for their RCRA violations is excessive and thus violative of the Eighth Amendment. The Eighth Amendment states that "[e]xessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The district court noted that prior case law had delineated a set of factors that aid a court in determining whether it is appropriate to impose a RCRA civil penalty and if so, how much. J.A. at 145-46; *see United States EPA v. Environmental Waste Control, Inc. ("EWC")*, 710 F. Supp. 1172, 1242-45 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *T & S Brass & Bronze Works, Inc.*, 681 F. Supp. at 322. Moreover, the court recognized that RCRA provided for a civil penalty in amount not to exceed $25,000 for each day of violation, 42 U.S.C. § 6928(g). J.A. at 145. After applying these factors to this case, the district court determined that a civil penalty of $1,500,000, which was less than $400 per day of violation, was appropriate. J.A. at 146. The district court noted that the Defendants had raised an excessive Fines Clause defense to the penalty, and after comparing the amount of this penalty with the civil penalties imposed in other environmental cases, the court determined that the penalty was not excessive. J.A. at 147-48; *see also EWC*, 710 F. Supp. at 1245 (imposing RCRA civil penalty of $2,000 per day for total of $2,778,000 when penalties totalling over $60,000,000 could have been rendered); *T & S Brass*, 681 F. Supp. at 322 (imposing RCRA

civil penalty of $1,000 per day for total of $194,000 when penalties totalling $4,850,000 could have been rendered).

Assuming without holding that a RCRA civil penalty is subject to the Excessive Fines Clause, *see Austin v. United States*, 113 S. Ct. 2801, 2805-06 (1993); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989), and recognizing that a reviewing court should afford deference to legislative judgments concerning appropriate sanctions for the conduct at issue, *see Browning-Ferris Indus.*, 492 U.S. at 281 (Brennan, J., concurring); *id.* at 301 (O'Connor, J., concurring in part and dissenting in part), we conclude that the district court did not impose an excessive civil penalty on the Defendants for their RCRA violations. Given that the Defendants were potentially in violation of RCRA for over 3,900 days and given that a maximum statutory penalty would have totalled over $90,000,000 dollars, we do not think the district court's $1,500,000 civil penalty was excessive.

C. Erroneous Factual Findings

Finally, the Defendants claim that the district court abused its discretion in assessing this penalty because it based the penalty on clearly erroneous factual findings. PPP Br. at 25. After reviewing the district court's factual findings, we find that they were clearly permissible and supported by the facts. Thus, we find that the district court did not abuse its discretion in imposing this civil penalty, jointly and severally, on the Defendants for their RCRA violations.

III. Failure to Reduce Civil Penalty

Next, the Defendants contend that the district court erred in refusing to reduce its civil penalty assessment by $60,000, the amount of a prior settlement between the State of Michigan and Marguerite Ladney, Michael Ladney's former wife. The district court determined that it was not obliged to reduce the amount of the civil penalty because, unlike the Defendants, Mrs. Ladney was never adjudicated to be liable for the RCRA violations at issue. J.A. at 148. Furthermore, the court relied on the Ladneys' divorce decree, which required Mr. Ladney to hold Mrs. Ladney harmless for the pollution problem at the Richland facility. *Id.*

The Defendants rely on case law that is misleading, and their argument is meritless. They only cite cases involving a cost recovery or contribution under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, but not a civil penalty assessment. *See* PPP Br. at 41 (citing *United States v. Laskin*, No. C84-2035Y, 1989 WL 140230 (N.D. Ohio Feb. 27, 1989); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 669 F. Supp. 854 (N.D. Ill. 1987); *United States v. Conservation Chemical Co.*, 628 F. Supp. 391, 400 (W.D. Mo. 1985), *order modified by*, 681 F. Supp. 1394 (W.D. Mo. 1988)). These cases are inapposite to a RCRA civil *penalty* assessment. In the different context of CERCLA cost recovery actions, Congress logically specified a reduction in "the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2). No analogous provision, however, exists under RCRA. Furthermore, these cases relate to reimbursement liability for the out of

pocket response costs incurred by the government for responding to contamination. Such a case is irrelevant to the broad discretion judges have in assessing civil penalties under RCRA.

We hold that the district court did not abuse its discretion in refusing to reduce the Defendants' RCRA civil penalty by the amount of Mrs. Ladney's settlement with the State of Michigan.

IV. Groundwater Monitoring Trust Fund

The Defendants contend that the district court erred in directing the Defendants to establish a groundwater monitoring trust fund, when no such relief was sought in the Complaint. PPP Br. at 43. This claim reflects the Defendants unfamiliarity with the Complaint and the federal regulations.

We review judgments granting a permanent injunction under an abuse of discretion standard. *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 553 (6th Cir. 1994) (citing *Crane by Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) ("Our review of the district court's decision to grant a permanent injunction 'is limited to the determination of whether the district court abused its discretion in deciding that the circumstances of the case justified injunctive relief.' ")).

Groundwater monitoring is an essential element of any post-closure plan as set forth in 40 C.F.R. § 265.117(a)(1) and 40 C.F.R. Part 265 Subpart F (encompassing 40 C.F.R. §§ 265.90-.94). Section 265.117(a)(1)

prominently mandates compliance with all Subpart F groundwater monitoring requirements. This post-closure plan obligation is pled in paragraph 17 of the Complaint with specific reference to 40 C.F.R. § 265.117. J.A. at 55. The Defendants' failure to meet this obligation is pled in paragraphs 34, 38, and 52 of the Complaint. Thus, the Defendants' charge that groundwater monitoring relief was not sought in the Complaint is meritless.

The Defendants also argue that the district court erred in ordering $2.4 million to be placed in a groundwater monitoring trust fund because this figure ignored the time value of money and thus was irrational. PPP Br. at 44. Defendants' claim, however, again ignores the clear and unambiguous language of a RCRA regulation. Specifically, 40 C.F.R. § 265.144(a)(2) provides that "[t]he post-closure cost estimate is calculated by multiplying the annual post-closure costs estimated by the number of years of post-closure care required under § 265.117." The undisputed annual post-closure cost estimate is $80,000. PPP Br. at 44. The undisputed number of years of post-closure care required under RCRA is thirty. PPP Br. at 44. The product of thirty years and $80,000 per year is clearly $2.4 million.

Application of the unambiguous language in 40 C.F.R. § 265.144(a)(2) does not allow for the present value discounting that the Defendants advocate. Consequently, the district court did not abuse its discretion in ordering the Defendants to comply with the regulation.

V. Appointment of a Receiver

Because the Defendants did not follow the district court's September 4, 1992 order and achieve full RCRA compliance within ninety days, the court, consistent with its prior warning, appointed a receiver on December 10, 1993, to identify the assets of the Defendants and liquidate those necessary to provide funding to achieve RCRA compliance. The Defendants contend in case No. 93-2618 that the district court lacked the authority or abused its authority in choosing this means to enforce RCRA compliance. PPP Br. at v, 11. The Defendants seek to substantiate this contention on several grounds.

The district court's determination to appoint a receiver is a matter firmly within its discretion and will be reversed only if such discretion has been abused. *Guy v. Citizens Fidelity Bank & Trust Co.*, 429 F.2d 828, 833-34 (6th Cir. 1970).

First, the Defendants claim that the appointment of a receiver cannot be viewed as an appropriate form of RCRA relief because Congress failed to expressly confer this power. PPP Br. at 12. RCRA specifically denotes a temporary or permanent injunction as "appropriate relief" in the face of RCRA violations. 42 U.S.C. § 6928(a)(1). Nothing in RCRA, however, purports either to specify or limit the federal courts' authority with respect to *how* they are to enforce an injunction that is not obeyed. In fact, it makes no sense to read RCRA's authorization of suits to secure "appropriate relief," 42 U.S.C. § 6928(a)(1), as allowing the federal courts to grant injunctions, but not to enforce them by judicially appropriate means.

The district court in this case relied on Federal Rules of Civil Procedure 66 and 70, as well as its inherent authority to fashion equitable relief and enforce its prior orders, to authorize its decision to appoint a receiver. J.A. at 190. After reviewing these bases of authority, we are convinced that the district court was well within its discretionary authority to appoint a trustee/receiver to secure PPP's compliance with the court's injunction. *See Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Feliciano v. Colon*, 771 F. Supp. 11 (D.P.R. 1991) (appointing special master to assure performance of non-compliant defendants' environmental obligations under injunctive order); *United States v. City Detroit*, 476 F. Supp. 512, 520 (E.D. Mich. 1979) (appointing Mayor of Detroit to administer water treatment plant of Detroit in order to achieve compliance with court's injunction and Clean Water Act regulations, after defendants defied court's orders).

Despite this authority, the Defendants assert that the district court abused its discretion by imposing this remedy because it is not consistent with RCRA's stated objectives to regulate the disposal of waste. The Defendants argue that RCRA's objectives "do not extend to a court interposing itself in the operation of hazardous waste facilities or in their remediation." According to the Defendants, the latter objective is left to CERCLA, with its well defined study, remediation, and cost recovery provisions, and the responsibility for such environmental compliance is a role limited to the EPA, not the federal district courts through the auspices of a receiver. PPP Br. at 13.

We also find this assertion meritless. Defendants are the RCRA violators, who have still failed to close their hazardous waste facility in the manner required by RCRA and the court's injunction. It is amazing that the Defendants now argue that to compel them to comply with RCRA would serve no objective of RCRA. The injunction commands that the Defendants close up the Richland facility in compliance with RCRA, and such action by the Defendants would undeniably serve RCRA's purpose. It logically follows that the district court's enforcement of the same injunction would also serve RCRA's purpose.

Finally, the Defendants argue in a similar manner that the district court lacked authority to appoint a receiver to produce RCRA compliance because the Defendants no longer own or operate the Richland facility. PPP Br. at 11. They claim that RCRA only applies to *current* owners and operators of hazardous waste sites and that the cleanup of former hazardous waste sites is properly the subject matter of CERCLA. *Id.*

The Defendants were forced to relinquish title to the Richland facility to the State of Michigan in 1993 for failure to pay their property taxes, but this fact does not alter the Defendants' legal obligation to comply with the injunction to which they were already subject. The Defendants' argument amounts to the assertion that they can dissolve an injunction by an act of noncompliance – failure to pay taxes. This is absurd.

The Defendants incurred this RCRA liability while they were the owners and operators of the Richland facility. Although they no longer own the property, it is not impossible for them to comply with the injunction.

The district court's Trustee Memorandum gives the Defendants, themselves, the opportunity to draw upon the proceeds from the receiver's liquidation of their assets to fund the compliance work at the site. In short, the Defendants' relinquishment of title to the Richland site has affected neither the need for their RCRA violations to be cured, nor Defendant's ability to comply with the injunction requiring this work to be done. Only if the Defendants remain unwilling to complete the closure with the funds generated by the receiver, will the State step in to perform the necessary work with the same funds.

In the end, it is clear that the district court had the authority to appoint a receiver and that it did not abuse its discretion in choosing this means of enforcing its permanent injunction.

VI.

Based on the foregoing analysis, we **AFFIRM** the decisions of the district court.

No. 91-1728

UNITED STATES COURT OF APPEAL

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, AND FRANK J. KELLY, Attorney General for the State of Michigan ex rel., MICHIGAN NATURAL RESOURCES COMMISSION, and GORDON E. GUYER, Director of the Michigan Department of Natural Resources,

Plaintiffs-Appellees,

v.

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTIC CO., INC., MICHAEL J. LADNEY, JR.,

Defendants-Appellants.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

(Filed Feb. 20, 1992)

BEFORE: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Production Plated Plastics, Inc., Michael Ladney and Michigan City Plastics appeal the district court's grant of summary judgment to the United States. We need not repeat the facts of this case as they

have been outlined in *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 960-91 (W.D. Mich. 1990). In granting summary judgment, the district court found Production and Production's president, Michael Ladney liable for violations of the Resource Conservation and Recovery Act and the Michigan Hazardous Waste Management Act. The district court found as a matter of law, Production lost its interim status to operate a hazardous waste facility on November 8, 1985 and continued its hazardous waste activities after that loss.

In a separate opinion, the district court granted partial summary judgment to the United States in the form of a permanent injunction against Production, Michael Ladney, and Production's parent corporations, Michigan City Plastics. The permanent injunction requires Production, Ladney, and Michigan City Plastics to implement and complete a state-approved closure plan as mandated by RCRA and Michigan's hazardous waste act. The district court incorporated the approved plan into the injunctive order and included a time schedule for completion of the various parts of the plan. The court ordered that if Production was unable to comply with the closure plans, Production must fully comply with post-closure maintenance requirements as stated in 42 U.S.C. § 265. The court also ordered Production to implement a new groundwater monitoring system approved by Michigan's Department Natural Resources.

We have reviewed the record and find that the district court properly applied the standards for injunctive relief. By not closing the Richland facility in November 1985, Production was in direct conflict with RCRA. The continued use of the facility after November 1985, and

the failure to implement the state-approved closure plans imposes a continuing health hazard and thwarts the express purpose of RCRA. Production argues that it is impossible for Production to comply with the district court's injunction. Other courts have effectively rejected impossibility as a viable defense. *See United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 321 (D.S.C.), *aff'd*, 865 F.2d 1261 (4th Cir. 1988).

Production and Ladney are the only parties who can bring about closure of the facility in keeping with RCRA's mandate. The purposes and intent of RCRA in its application to the Richland facility will be achieved only through the implementation of the approved closure plan. The district court has correctly and appropriately insured the implementation of the closure plan by finding Production, Michigan City Plastics and Michael Ladney liable for violations of RCRA and Michigan's hazardous waste act and through the imposition of an injunctive order.

We adopt the opinions of the district court and the findings contained therein.

A TRUE COPY

Attest:

LEONARD GREEN, Clerk

By /s/ Sharon R. Tallango
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

OPINION

INTRODUCTION

Plaintiffs United States of America, Frank J. Kelley, Attorney General for the State of Michigan, the Michigan Natural Resources Commission, and Gordon E. Guyer, Director of the Michigan Department of Natural Resources (collectively the "government"), filed the present action for permanent injunctive relief and imposition of civil penalties against defendants Production Plated Plastics, Inc., Michigan City Plastics, Inc., Michael J. Ladney, Jr.,[1] and Marguerite Ladney, pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6928(a) and (g), and Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), M.C.L.A. § 299.548. Plaintiffs allege that defendants operated a hazardous waste facility and stored and disposed of hazardous waste at defendant's Richland, Michigan facility ("PPP facility") in violation of RCRA and HWMA.

More specifically, Count 1 of plaintiffs' complaint alleges violations of Section 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and the RCRA regulations, 40 C.F.R. Part 265, by discharging hazardous waste into unlined surface impoundments and by operating waste piles without an RCRA permit or RCRA interim status. Count 2 alleges a violation of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and the RCRA regulations, 40 C.F.R. § 265.112, by failing to submit a closure plan for the surface impoundments and waste piles within 15 days after termination of the interim status, and by failing to commence or complete closure in a timely manner. Count 3 alleges a violation of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and the RCRA regulations, 40 C.F.R. § 265.118, by failing to submit a post-closure plan for the surface impoundments and an adequate post-closure plan for waste piles. Count 4 alleges a violation of Sections 6 and 22 of HWMA, M.C.L.A. §§ 299.506, .522, for the continued operation of an unlicensed hazardous waste storage and disposal facility.[2]

Presently pending before the Court is plaintiffs' motion for partial summary judgment as to the issues of defendants Production Plated Plastics, Inc.'s and Michael J. Ladney's liability under RCRA and HWMA pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, plaintiffs' motion for partial summary judgment is granted.

FACTS

Defendant Production Plated Plastics, Inc. ("PPP") is a corporation which has engaged in molding, electroplating, and painting of plastic parts primarily for the automotive industry since commencing operations in 1966. The manufacturing processes involve creation, discharge, and storage of hazardous wastes.

In 1977, the Michigan Department of Natural Resources ("MDNR") filed an action in state court against PPP seeking to enjoin PPP from discharging wastes and seeking to order PPP to remove wastes pursuant to the Water Resources Commission Act, M.C.L.A. §§ 323.1 *et seq.* The state court entered a consent order in 1978 requiring PPP to remove sludge and to install and operate purge wells. Subsequent modifications of the order specified the minimum amounts of sludge PPP was required to remove per month as part of remediation and ordered other remediation procedures.

On August 18, 1980, pursuant to newly enacted RCRA requirements, defendants provided the Environmental Protection Agency ("EPA") a "Notification of Hazardous Waste Activities," listing specific hazardous wastes that were generated, treated, stored, and disposed of at the PPP facility. The notification form listed Michael J. Ladney, Jr., as the "Installation's Legal Owner." PPP also provided the EPA with a Part A permit application for permission to continue to treat, store or dispose of hazardous wastes at the PPP facility. Submission of the Part A application automatically granted PPP interim status to continue operations pending review of their application. *See* 42 U.S.C. § 6925(e)(1); 40 C.F.R.

§ 270.70(a). The Part A application listed Ladney as the facility's owner and operator and was signed by Ladney. PPP submitted a revised Part A application on or about January 17, 1985, changing the facility's legal owner to "Production Plated Plastics, Inc."

In July 1984, PPP submitted a Part B permit application. In February and October of 1985, the EPA notified PPP of deficiencies in the second part of their application. PPP acknowledged, by letters dated November 5, 1985, and November 20, 1985, that it could not meet the RCRA financial responsibility requirements, although it claimed a good faith effort to obtain insurance. Nonetheless, PPP continued to discharge hazardous waste. However, on July 16, 1986, the Associate Regional Counsel for the EPA wrote a letter to PPP stating that the "EPA will approve the rate of removal of waste proposed in the closure plan that is in accordance with the order of the Kalamazoo County Circuit Court."

PPP filed a "Piled and Buried Sludge Closure" plan and subsequent revisions with the EPA on March 26, 1986, October 14, 1986, and July 29, 1987. PPP also filed a "Tentative Surface Impoundment Closure Plan" and subsequent revisions with the EPA on May 20, 1986, February 25, 1987, and on August 12, 1987. On September 30, 1988, the State of Michigan apparently approved the proposed closure plans. It is not clear to what extent PPP has complied with such plans to date.

STANDARD FOR REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

APPLICABLE LAW & ANALYSIS

RCRA was enacted as an amendment to the Solid Waste Disposal Act in an attempt by Congress to deal with problems posed by the general disposal of wastes in this country as well as the particular problems associated with the disposal of hazardous substances. Pub. L. No.

94-580, 1976 U.S. Code Cong. & Admin. News (90 Stat.) 2795, 2798; H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 2-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6239-43. The Act, amended three times since its initial enactment,[3] authorizes the EPA to identify hazardous wastes, to promulgate standards for operators of hazardous waste facilities, and to issue permits for the operation of hazardous waste disposal facilities. *See* 42 U.S.C. §§ 6921-25. Under the Act, a civil suit may be brought against "any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal." 42 U.S.C. § 6973(a). RCRA is a remedial strict liability statute which is construed liberally. *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

The 1980 amendments to RCRA, effective November 19, 1980, required each owner and operator of a "facility for the treatment, storage, or disposal of hazardous waste" to obtain a permit. 42 U.S.C. § 6925(a). However, facilities in operation at the time of enactment of the permit requirement were granted interim status in order to operate without an RCRA permit pending administrative action on the permit application. 42 U.S.C. § 6925(e).

In 1984, RCRA was amended to terminate interim status if certain conditions were not satisfied. The 1984 amendment provides that:

> In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve

> months after November 8, 1984, unless the owner or operator of such facility –
>
> > (A) applies for a determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and
> >
> > (B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

42 U.S.C. § 6925(e)(2). Thus, under this section, a facility was required to submit a Part B permit application certifying compliance with applicable groundwater monitoring and financial responsibility requirements before November 8, 1985. If the facility failed to satisfy the above conditions, interim status was lost as of November 8, 1985. 42 U.S.C. § 6925(e)(2) (A); 40 C.F.R. § 270.73; 50 Fed. Reg. 38946, 38946-49 (Sept. 25, 1985); 50 Fed. Reg. 28701, 28723-24 (July 15, 1985). Further, if the hazardous waste treatment storage and disposal facility lost its interim status, the owner or operator of the facility was required to submit a closure plan and post-closure plan to the EPA within fifteen days of the termination of interim status and to complete partial and final closure activities within 180 days after the EPA's approval of the closure plan. *See* 40 C.F.R. §§ 265.112(d)(3)(i), 265.118(e)(1), 265.113(b).

The government has the initial responsibility of establishing the absence of a material issue of fact for trial regarding RCRA and HWMA liability. The government has established that PPP is the owner or operator of a

hazardous waste facility which stored and disposed of waste both before and continuing after November 19, 1980. Thus, under the 1980 amendments, PPP automatically was granted interim status with the submission of its Part A application. However, PPP failed to certify compliance with the financial responsibility requirements mandated by the 1984 amendments, failed to obtain an RCRA permit, and failed to meet RCRA deadlines for having permitted land disposal units and adequate underground monitoring. Thus, as a matter of law, PPP lost interim status as of November 8, 1985. *See United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Nonetheless, PPP continued its waste activities. Furthermore, defendants failed to submit required closure and post-closure plans within the appropriate time periods. Accordingly, plaintiffs have established a *prima facie* case of liability.

Plaintiffs having established a *prima facie* case of liability, the Court next must consider defendants PPP's and Ladney's defenses in order to determine whether summary judgment with regard to liability is appropriate. In attempts to avoid liability and in opposition to partial summary judgment, PPP and Ladney deny violating RCRA and HWMA, arguing that compliance with the state court ordered remediation closure plan complies with the intent and requirements of RCRA and HWMA and was accepted by the EPA, that plaintiffs are estopped from seeking a closure plan inconsistent with the state plan, that defendants' inability to comply with the financial responsibility requirements of RCRA regulations

excuses lack of compliance, and that plaintiffs have selectively enforced this action against them in violation of equal protection and due process.

A. COMPLIANCE WITH STATE PLAN/ESTOPPEL

As their first defense, defendants argue that timely filings with the EPA and compliance with the state court ordered lagoon closure plan satisfy the intent of RCRA. Defendants urge the Court to review the provisions of the state court closure plan in light of RCRA's objectives and the impact on such plan if PPP was forced to cease operations due to its inability to meet the financial responsibility requirements. Further, defendants argue that representations by the EPA that the state closure plan was acceptable to the EPA estops the EPA from bringing the present enforcement action.

After conducting a complete review of the file, record, and prior proceedings in this matter, the Court concludes that the consent judgment in state court does not relieve PPP of obligations under RCRA. The Court finds no authority for the proposition that compliance with a state remedial order excuses an RCRA violation. The Court recognizes the frustration underlying defendants' arguments, but finds that the state court proceedings do not change the fact that they have violated RCRA. Rather, defendants' arguments may be considered in fashioning an appropriate remedy. Furthermore, the Court does not believe that the EPA letter dated July 16, 1986 excuses liability, although again such fact may be relevant when appropriate damages and/or penalties are assessed.[4]

Accordingly, the Court concludes that defendants' first defenses do not excuse defendants from liability for RCRA and HWMA violations.

B. INABILITY TO SATISFY FINANCIAL RESPONSIBILITY REQUIREMENT

Next, relying on *United States v. T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314 (D. S.C. 1988), defendants apparently argue that since it was impossible for them to satisfy the financial responsibility requirements, they are excused from complying with RCRA requirements. However, the Court notes that in *T & S Brass*, although not controlling authority over this Court's disposition of the matter, the district court held that neither T & S Brass' argument that it made a good faith attempt to obtain insurance nor that insurance was impossible to obtain were sufficient defenses. On appeal, the Fourth Circuit, affirming in part and vacating in part, also rejected the impossibility defense. *United States v. T & S Brass & Bronze Works, Inc.*, No. 88-3531, slip op. at 4 (4th Cir. Dec. 22, 1988) (per curiam) (unpublished).

After reviewing the facts of this case and the existing caselaw, the Court concludes that neither an impossibility defense nor good faith efforts to secure financial assurances are defenses to liability after November 8, 1985, although such efforts are pertinent to the appropriate remedies or imposition of sanctions. *See United States v. Clow Water Systems, A Division of McWane, Inc.*, 701 F. Supp. 1345, 1348 (S.D. Ohio 1988); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 285 (W.D. Mich. 1988); *T & S Brass & Bronze Works*, 681 F. Supp. at 321.

Thus, the Court concludes that this defense also does not preclude a finding of liability.

C. SELECTIVE ENFORCEMENT

Finally, defendants argue that this action is constitutionally invalid since the government has selectively enforced RCRA and HWMA against defendants in bad faith or arbitrarily while others similarly situated have not been prosecuted. Defendants argue that the site at issue, which is a compliant company on a non-dangerous site, does not appear on the MDNR's list of hazardous waste sites requiring remediation, while many dangerous sites on the list have not been subjected to enforcement actions.

The government generally is afforded a presumption of validity in the enforcement of federal statutes and its discretion in enforcing federal statutes is extremely broad, although not unfettered. *See Wayte v. United States*, 470 U.S. 598, 607-10 (1985); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). In order to state a *prima facie* selective prosecution defense, defendants bear a heavy burden of establishing that (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for prosecution "invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights." *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986); *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983).

The Court finds no proof of selective prosecution other than defendants' mere allegations and arguments in their brief which are not sufficient to raise an issue of material fact. Defendants have provided no proof that similarly situated violators have not been cited for RCRA violations. Furthermore, even if defendants had satisfied the first element of a selective enforcement defense, there also is no evidence of governmental vindictiveness, that the selection was based on race, religion or some other arbitrary classification which would support finding a denial of equal protection, or that the government engaged in intentional, purposeful discrimination which would meet defendants' heavy burden of establishing a *prima facie* case of selective enforcement. As a result, the Court finds that defendants' selective enforcement defense does not preclude summary judgment as a matter of law.

Accordingly, since defendants have failed to present a valid defense to liability, summary judgment solely on the issue of liability is appropriate in favor of plaintiffs and against defendant PPP.

D. INDIVIDUAL LIABILITY UNDER RCRA

Since the Court has determined that defendant PPP is liable for violations of RCRA and HWMA, the Court must determine whether a question of fact exists regarding whether defendant Ladney is jointly liable for such violations. An action alleging violations of RCRA may be brought against "any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or

disposal facility)." 42 U.S.C. § 6973(a). Thus, corporate officers and employees who actually make corporation decisions are personally liable under RCRA. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 745 (8th Cir. 1986).

In their complaint, plaintiffs allege that Ladney is the owner or operator of PPP. Defendants dispute plaintiffs' allegations and argue that plaintiffs must be able to prove that Ladney plays an active role in controlling the waste management policies and practices of PPP in order to hold Ladney personally liable for the alleged violations. However, although defendants do agree that Michigan City Plastics, Inc. ("MCP") owns PPP and that Ladney owns 68% of MCP's stock, defendants contend that there is no evidence that Ladney actively controls MCP or plays an active role in controlling the waste management policies and practices of PPP.

Plaintiffs respond that Ladney's name appears as the "Installation's Legal Owner" on the initial "Notification of Hazardous Waste Activities" and on the Part A application. However, the Court notes that the revised Part A application substituted "Production Plated Plastics, Inc." as the legal owner of the facility. Plaintiffs also contend that in his deposition, William Evans, PPP's plant manager, stated that he frequently discussed the manufacturing of products with Ladney.

In its review of the parties' briefs and attachments, the Court notes that defendants have submitted various documents and depositions which in fact provide evidentiary support that Ladney is personally involved in or directly responsible for acts in violation of RCRA and

HWMA. Defendants have submitted the deposition of Steven D. Noble, an environmental specialist for PPP. Noble states that Ladney is a corporate officer of PPP who is in daily contact with William Evans. Defendants also have submitted the affidavit of Ladney, as president of PPP, which states that he is competent to testify as to the facts of this case and in which he asserts decision-making authority. Finally, defendants have submitted a letter from Ladney, written in his capacity as president of PPP, outlining PPP's long-term plan of operations.

The Court, viewing the evidence submitted in the light most favorable to the nonmoving party and drawing all reasonable inferences, finds that the evidence shows that Ladney was actively involved in the day-to-day operations of PPP. Defendants assert in their briefs that plaintiffs have not established that Ladney was actively involved in the operations of PPP. However, defendants provide no evidence that Ladney is not PPP's owner or operator. Defendants offer no explanation of the statements made in Ladney's affidavit which indicate that he is the ultimate decision-making authority, or how, as president of PPP, he is to be excluded from the natural and reasonable inference that he had an important say in or actually made the corporate decisions. Accordingly, the Court holds Ladney jointly liable with PPP for RCRA and HWMA violations.

CONCLUSION

The Court concludes that no genuine issue of material fact exists with regard to defendants PPP's and Ladney's liability, thus plaintiffs are entitled to judgment

as a matter of law. In reaching its decision, the Court has not considered the appropriateness of civil penalties and/or injunctive relief. Although PPP and Ladney have been found liable as a matter of law, the issue of appropriate remedies and/or penalties will be considered in light of the state court orders and in conjunction with defendants' various defenses.

The Court recognizes that this is a unique case. Although RCRA and HWMA requirements have not been met and defendants are liable for RCRA and HWMA violations, the Court encourages continual attempts by the parties to resolve this matter and notes that it will consider factors such as the state court proceedings and steps taken pursuant to such proceedings when fashioning the appropriate relief warranted.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: May 14, 1990

FOOTNOTES

[1] Unless otherwise indicated, references to "Ladney" refer to defendant Michael J. Ladney, Jr., and not to defendant Marguerite Ladney.

[2] HWMA authorizes the continued operation of a facility that was in existence on the effective date of the 1982 Act, March 30, 1983, if certain conditions were met. One of the conditions is compliance with the federal solid waste disposal act regulations, 42 U.S.C. §§ 6901 *et seq.* M.C.L.A. § 299.522(c). An owner or operator of a hazardous waste facility in Michigan is required to comply with

RCRA and HWMA, administered by both the EPA and the State of Michigan. *See* 42 U.S.C. §§ 6926; 6928(a)(2).

[3] The initial statute was amended by the Quiet Communities Act of 1978, Pub. L. No. 95-609, § 7, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 3079, 3081-84; Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 2334; Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 3221.

[4] The Court notes that as a general rule equitable defenses such as estoppel are not available against the sovereign when it is asserting public rights. *See, e.g., Costello v. United States*, 365 U.S. 265, 281 (1961); *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 125 (1919). "Where the defenses of unclean hands or laches have been used against the government when it is asserting public rights, courts have repeatedly held that equitable principles will not be applied to thwart public policy or the purpose of federal laws." *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1451 (W.D. Mich. 1989).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

ORDER

(Filed May 15, 1990)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 14th day of May, 1990.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated May 14, 1990,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC. *et al.*,

Defendants.
_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

OPINION

Plaintiffs United States of America, Frank J. Kelley, Attorney General for the State of Michigan, the Michigan Natural Resources Commission, and Gordon E. Guyer, Director of the Michigan Department of Natural Resources (collectively the "government"), filed the present action for permanent injunctive relief and imposition of civil penalties against defendants Production Plated Plastics, Inc. ("PPP"), Michigan City Plastics, Inc. ("MCP"), Michael J. Ladney, Jr., and Marguerite Ladney,[1] pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976 ("RCRA" or the "Act"), 42 U.S.C. §§ 6928(a) and (g), and Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), M.C.L.A. § 299.548.

On May 14, 1990, this Court determined that defendants Michael J. Ladney, Jr. ("Ladney") and PPP operated a hazardous waste facility and stored hazardous waste at their Richland, Michigan facility (the "Richland facility") in violation of RCRA and HWMA. Specifically, Ladney

and PPP violated Sections 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and the RCRA regulations, 40 C.F.R. Part 265, by discharging hazardous waste into unlined surface impoundments and by operating waste piles without an RCRA permit or RCRA interim status. They also failed to submit required closure and post-closure plans and commence and complete closure of the Richland facility within the time periods required by RCRA Section 3005(e) and 40 C.F.R. §§ 265.112 and 265.118. These RCRA violations in turn amounted to violations of Sections 6 and 22 of HWMA, M.C.L.A. §§ 299.506 and 299.522, for the continued operation of an unlicensed hazardous waste storage and disposal facility.[2]

Now pending before the Court is plaintiffs' motion for partial summary judgment as to appropriate injunctive relief pursuant to Federal Rule of Civil Procedure 56. Plaintiffs request that the Court order PPP and Ladney:

> (i) to conduct, complete and certify closure pursuant to all terms and conditions of the closure plan approved by the State of Michigan, as required by 40 C.F.R. § 265.112(d);
>
> (ii) to provide financial assurance for closure in accordance with 40 C.F.R. § 265.143;
>
> (iii) to comply with all financial responsibility requirements of 40 C.F.R. § 265.147; and
>
> (iv) to comply with all groundwater monitoring requirements in 40 C.F.R. Part 265 Subpart F.

For the reasons stated below, the motion is granted in part and denied in part.

I.

A. Statutory and Regulatory Guidelines

In 1976 Congress enacted RCRA, 42 U.S.C. §§ 6901 *et seq.*, to regulate the disposal of solid waste in the United States. The overriding concern of the legislation is to minimize the adverse environmental impact of solid waste, especially hazardous waste. Its objectives are "to promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902(a).[3] To meet those objectives Congress fashioned a far ranging regulatory scheme which is designed to encourage solid waste planning by states and fund resource recovery projects.

Specifically, Section 3004(a) of RCRA requires that the United States Environmental Protection Agency ("EPA") Administrator promulgate regulations establishing performance standards for owners and operators of hazardous waste facilities "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924(a).[4] Section 3005(a) provides for regulations "requiring each person owning or operating an existing facility . . . for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section." 42 U.S.C. § 6925(a). The issuance of operating permits is the primary mechanism established in RCRA for enforcing the hazardous waste regulatory scheme with respect to the owners and operators of treatment, storage, and disposal facilities.

Under Section 3005(e) a hazardous waste management facility that was in existence on November 19, 1980, could obtain authority to continue operations as an

"interim status" facility by filing a "Part A application" with the EPA. The Part A application requires information concerning the nature of the applicant's business, a scale drawing, photographs and a topographic map of the facility, a description of its hazardous waste management processes and the design capacity of these processes, a specification of the types and quantities of hazardous wastes processed, stored or disposed of at the facility as well as information regarding permits or construction approvals received or applied for by the facility. 40 C.F.R. § 270.14. An interim status facility's operation is limited to the types of wastes and procedures specified in the Part A application and the facility must comply with the operating standards of 40 C.F.R. § 265.

Recognizing widespread noncompliance with the basic regulatory requirements of RCRA, Congress amended the Act in 1984 to provide that all interim status hazardous waste land disposal facilities would automatically lose their interim status unless they certified by November 8, 1985, that they were in compliance with all applicable groundwater monitoring and financial responsibility requirements. 42 U.S.C. § 6925(e)(2). Upon losing interim status the facility must immediately cease its hazardous waste management operations and within fifteen days the owner or operator of the facility must submit a "closure" plan for approval by the regional administrator of the EPA. 42 U.S.C. § 6925(a); 40 C.F.R. § 265.112(d)(3)(i).[5] The public is provided an opportunity to comment on the submitted plan. 40 C.F.R. § 265.112(d)(4). The regional administrator must approve, modify, or disapprove the plan within ninety days of its

receipt. If the regional administrator modifies or disapproves the plan, the owner or operator has thirty additional days to modify the plan or submit a new plan. Finally, the regional director must approve or modify this plan within an additional sixty days. If the regional director modifies the plan, it becomes an approved plan. *Id.* The owner or operator may apply for an amendment of the plan at any time prior to closure of the facility by submitting a written request to the regional administrator. After review, the proposed modifications must be accepted or rejected by the regional administrator. 40 C.F.R. § 265.112(c).

The facility must begin final closure within ninety days of approval of a closure plan and must complete closure within 180 days of approval of the closure plan, unless the regional administrator permits an extension of the closure period. 40 C.F.R. § 265.113. After closure is complete, the owner or operator is required to maintain post-closure care of the facility for a period of thirty years unless the regional administrator finds that a shorter post-closure care period is sufficient to protect human health and the environment. 40 C.F.R. § 265.117.

The regulations also require that the owner or operator of a surface impoundment landfill or land treatment facility used to manage hazardous waste must implement a groundwater monitoring system capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility. 40 C.F.R. §§ 265.90 *et seq*. The groundwater monitoring requirement applies during the active life of the facility and throughout the post-closure care period. 40 C.F.R. § 265.111.

Along with the closure, post-closure and monitoring requirements, the owner or operator must establish and maintain financial assurance for proper closure and post-closure care of the facility, as well as liability coverage of specified amounts for bodily injury and property damage to third parties resulting from sudden accidental occurrences at the facility. 40 C.F.R. §§ 265.140 *et seq*. These financial responsibility requirements are designed to ensure that funds are available to close the facility and maintain post-closure monitoring of the facility. An owner or operator has a variety of options to choose from in establishing financial assurance. Among these are establishment of a closure trust fund, obtaining a surety bond guaranteeing payments into a closure trust fund, obtaining a letter of credit or sufficient closure insurance, or passing a financial test set out in the regulations. 40 C.F.R. § 265.143.

Finally, RCRA provides a mechanism by which a state can administer its own program in lieu of the federal program, although the state authorized program may be enforced by the federal government as well as the state. 42 U.S.C. § 6926. Michigan has been granted "Phase I" authorization by the EPA to regulate hazardous wastes through HWMA. HWMA was designed to track RCRA and is the state law equivalent of RCRA. All the regulations of 40 C.F.R. § 265 are adopted by reference in Rule 1003 of regulations promulgated pursuant to HWMA. Mich. Admin. Code § 299.11003(1)(n).

B. Facts

PPP has engaged in the molding, electroplating, and painting of plastic automobile parts at its Richland facility since 1969. The manufacturing processes involve the creation, discharge, and storage of hazardous wastes. On August 18, 1980, PPP provided the EPA a "Notification of Hazardous Waste Activities", listing specific hazardous wastes that were generated, treated, stored, and disposed of at the Richland facility. PPP also provided the EPA with a Part A application in order to achieve interim status pursuant to RCRA. At this time PPP identified 5,955 tons of listed hazardous waste in surface impoundments and a waste pile at the Richland facility. PPP was not able to meet the financial responsibility requirements of RCRA and so lost its interim status on November 8, 1985. Nevertheless PPP continued operating its hazardous waste management facility without a license until December 7, 1987. Although the proper timetable was not followed, a closure plan which estimated the total cost of closure at $2,300,000 was eventually submitted by PPP and approved by the Michigan Department of Natural Resources ("MDNR") on September 30, 1988. On October 19, 1989, and November 1, 1989, respectively, PPP submitted proposed amendments to the approved closure plan. On December 11, 1989, MDNR provided PPP with a Notice of Deficiency concerning the proposed amendments, and the amendments were never approved. PPP has entirely failed to implement the approved plan.

PPP and Ladney have also failed to meet the financial responsibility requirements of RCRA and have not implemented a groundwater monitoring system pursuant to RCRA. However, they assert that they have implemented

a similar groundwater monitoring and purge system under a consent order entered in a previous lawsuit brought by the MDNR in state court.

In their motion for partial summary judgment, plaintiffs argue that RCRA is a strict liability statute which is to be construed liberally in order to effectuate its remedial goals. Once PPP and Ladney were found liable for violations, an injunction requiring them to comply with RCRA should issue as a matter of law. An approved closure plan is in existence, and if PPP and Ladney had followed the timetable included in the approved plan, closure of the Richland facility would have been complete by now. Given RCRA's overriding concern with minimizing hazardous waste's "present and future threat to human health and the environment", plaintiffs contend the RCRA requirements should be implemented immediately.

PPP and Ladney answer that it is inappropriate to grant a permanent mandatory injunction at the summary judgment stage. Defendants assert that their compliance with a state court order and their alleged inability to fulfill RCRA's financial responsibility requirements are mitigating circumstances which the Court must take into account in fashioning injunctive relief. It is alleged that these mitigating circumstances require the Court to conduct an evidentiary hearing. Further, defendants argue that they cannot fulfill RCRA's financial responsibility requirements and that their implementation of a groundwater monitoring system required by a state court order precludes this Court from requiring them to implement another groundwater monitoring system pursuant to RCRA regulations.

II.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

The hornbook rule regarding injunctive relief is that in order to prevail a plaintiff must prove that there is no adequate remedy at law, that the plaintiff may suffer an irreparable injury if an injunction is not granted and that

the balance of the equities justifies an injunction. For this reason an evidentiary hearing is normally required before injunctive relief may be granted. *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983). However, it has been held that when the plaintiff is a governmental entity, or private attorney general, and the activity may endanger public health, injunctive relief is proper without undertaking a balancing of the equities. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983). Likewise in cases of public health legislation, the emphasis in balancing the equities shifts from irreparable injury to concern for the general public interest. *Id.*

The Supreme Court has recently held that when environmental legislation is at issue the court's focus should be on the *purpose* of the legislation. An injunction should not automatically issue whenever there is a statutory violation. Only if the conduct complained of thwarts the legislative purpose and the statute specifically provides for injunctive relief may the court issue an injunction without undertaking a balancing of the equities or finding irreparable injury. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542-43 (1987); *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

Even applying the traditional equity standards though, an injunction is normally the proper remedy for violations of an environmental statute. There is rarely an adequate remedy at law for an environmental injury, the injury is usually irreparable, and the important role of the public interest often shifts the balance of the equities in favor of equitable relief. *Gambell*, 480 U.S. at 545. *See also Lamphier*, 714 F.2d at 338 (when an injunction is authorized by statute irreparable injury need not be shown);

United States v. White, 769 F.2d 511, 515 (8th Cir. 1985) (If the prerequisites for a statutory remedy have been demonstrated and an injunction will fulfill the legislative purpose then the injunction should be granted).

III.

A. Implementation of Approved Closure Plan

Plaintiffs request that this Court order PPP and Ladney to finally implement the closure plan approved by the MDNR on September 30, 1988. As a preliminary matter defendants argue that injunctive relief is an inappropriate remedy to grant at the summary judgment stage and that the traditional standards for equitable relief require the Court to conduct an evidentiary hearing. This argument fails for two reasons.

First, it simply is not true that an evidentiary hearing is always required before an injunction is issued. When the evidence presented by affidavit and other documentation clearly establish the plaintiff's right to an injunction, a hearing need not be conducted. *American Can Co. v. Mansukhani*, 814 F.2d 421, 425 (7th Cir. 1987); *Socialist Workers Party v. Illinois State Board of Elections*, 566 F.2d 586 (7th Cir.), *affirmed* 440 U.S. 173 (1979). *See McCarthy v. Briscoe*, 429 U.S. 1317, 1324 (1976).

Moreover, as discussed above, the traditional requirements for injunctive relief are less rigid when environmental legislation is at issue. Following the Supreme Court's decision in *Gambell*, if the purpose of the legislation is thwarted by failure to comply and the legislation specifically authorizes injunctive relief, no finding of irreparable injury or balancing of the equities need be

made. Even if these traditional prerequisites are considered by the court, equitable relief will often issue given that an environmental injury is usually irreparable, plaintiffs rarely have an adequate remedy at law, and special weight must be given to the public interest in balancing the equities.

Because no material issue of fact remains as to defendants' liability, two issues now face the Court concerning the appropriateness of granting injunctive relief. First, does defendants' violation thwart the purpose of RCRA? If it does, an injunction should issue as a matter of law. Second, if the violation is not directly at odds with RCRA's purpose, is an injunction nevertheless compelled by a balancing of the equities?

As to the first issue, the purpose of RCRA as stated in its declaration of policy is to minimize hazardous waste's "present and future threat to human health and the environment." 42 U.S.C. § 6902(b). In failing to implement a closure plan mandated by RCRA, defendants are acting directly at odds with the stated purpose of RCRA. Every day that the Richland facility remains unclosed the threat from the hazardous waste stored there goes unabated. In addition, the Act specifically authorizes the issuance of injunctive relief to effectuate its goals. 42 U.S.C. § 6928(a)(1). Under the *Gambell* analysis it is clear that once liability has been established, as it has been here, an injunction ordering compliance with RCRA's closure requirements must be granted.

Even applying the traditional standards for issuing injunctive relief, implementation of the approved closure plan is mandated. It is evident that despite defendants'

assertions to the contrary there is no adequate remedy at law.[6] Money damages will not close the Richland facility. Given the harm already caused by defendants' violations and the continuing threat to human health and the environment, closure is the only adequate remedy. If the facility is to be closed pursuant to RCRA, it must be closed by the owners or operators. There is no other mechanism to effectuate closure under the Act. Irreparable injury is established by the nature of hazardous wastes, and in weighing the public interest the Court notes once again that RCRA is specifically designed to protect the public from the threat of harm caused by hazardous waste. As long as closure of the facility is not completed, that threat exists and is sufficient in itself to compel closure. *See USEPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (Permanent injunction pursuant to RCRA was supported by potential danger to environment and public health.)

The only "equity" in the balance which weighs in defendants' favor is that closure of the facility will be expensive. Defendants maintain that they do not presently have the $2,300,000 necessary to complete closure and that imposition of the requested relief will simply lead to contempt citations being issued against defendants. Defendants rely on the affidavit of Thomas Hinsberg, a certified public accountant, for the proposition that they do not have adequate funds to implement the approved closure plan.[7] In examining this argument the Court is cognizant of the fact that defendants had the financial wherewithal to operate the Richland facility for over two years *after* it lost interim status. RCRA is designed to ensure that closure takes place at a time

when owners and operators have the funds necessary to comply. If Ladney and PPP had fulfilled their obligations under RCRA beginning on November 8, 1985, the facility would have been closed some time in early 1986. Now, almost five years after closure should have been complete, there is no equity in permitting defendants to escape liability because they claim not to have the funds necessary to meet that liability.

It is also apparent that upon ordering defendants to close the facility today they are not required to deliver full payment for closure tomorrow. There is no requirement in RCRA that the entire cost of closure be paid at once. Defendants' main concern seems to be that they hold many non-liquid assets which will take some time to liquidate. Although the approved plan estimates that closure will cost $2,300,000, implementation of the plan will likely cost substantially less. There is nothing which prohibits defendants from beginning the closure process immediately. As it becomes necessary to expend more funds, assets can be liquidated to satisfy defendants' obligations until closure is complete. In any event defendants' unsubstantiated assertion that they are unable to pay for closure is an insufficient reason to deny injunctive relief. Plaintiffs have satisfied their burden of proving that a permanent injunction is warranted and the Hinsberg affidavit, relying as it does on unsubstantiated statements made by defendants, does nothing to raise a material issue of fact for trial.

Finally defendants contend that it is impossible for them to implement the approved closure plan because of changes in the rules and regulations applicable to disposal of hazardous wastes. They submit the affidavit of

Ronald C. Waybrant, an environmental consultant, which states that the approved closure plan does not provide for "stabilization" of the wastes before they are placed in a landfill. Waybrant maintains that stabilization is now required before the wastes may be buried. He also avers that the approved closure plan relies on the assumption that a specific smelter in Canada would be available to process certain sludges now stored at the Richland facility. He states that the smelter cannot process the sludge at the rate required by the plan.

After reviewing the approved closure plan the Court concludes that Waybrant's assertions are in error. The plan requires that wastes be treated "at a licensed hazardous waste management facility that will render the waste acceptable for disposal in accordance with the land ban restrictions specified in 1988 40 C.F.R. § 268.33 and 268.40." Approved Closure Plan, Modification 12. According to the affidavit of Kathleen Clancy, an environmental engineer employed by the MDNR, this requirement includes provision for stabilization of the waste. Waybrant's testimony does not identify which regulations now require stabilization or where the approved plan runs afoul of those regulations. The weight of the evidence, viewed in defendants' favor, establishes that the approved plan is in compliance with the applicable EPA regulations. Likewise, the plan makes no mention of the smelter in Canada.[8] There is no reason to believe that the plan cannot be fully implemented today.

In any event, defendants may propose amendments to the approved plan if the circumstances upon which the plan was based have changed. In fact, they are required

to amend the plan if "unexpected events require a modification." 40 C.F.R. § 265.112(c). The Court is informed that an amended plan is being prepared or recently has been prepared by Waybrant. There are administrative processes outlined in RCRA through which these proposed amendments will be reviewed by the EPA. Currently though the only approved plan is the 1988 plan and it must be implemented as expeditiously as possible.[9]

B. Provision of Financial Assurance

Plaintiffs request that defendants be ordered to provide financial assurance for closure in accordance with 40 C.F.R. § 265.143. Defendants maintain that this relief is inappropriate because they are unable to comply and plaintiffs have an adequate remedy at law, namely, a money judgment for a sum certain.

Viewing the totality of the evidence before it, the Court suspects that defendants are not being forthright in their assertion that they cannot provide financial assurance. They rely once again on the affidavit of Thomas Hinsberg as evidence of their inability to comply. It seems fair to say that if defendants had been acting in good faith for the past five years in attempting to comply with RCRA they could now present the Court with better evidence of their financial condition than a single affidavit which is admittedly untrustworthy and based on unsubstantiated statements of the defendants and their employees.

Still, the financial assurance requirement is secondary to the main goal of implementing the approved closure plan. Defendants are not required to provide

financial assurance before they implement the plan. This provision is designed to guarantee that funds will be available to complete closure and ultimately post-closure maintenance in the event that defendants fail to fulfill their closure and maintenance obligations. Applying the Supreme Court's *Gambell* analysis and giving defendants the benefit of the doubt, it does not appear that an injunction is necessary on this issue at this time. The overriding purpose of RCRA is not to ensure that defendants provide financial assurance, so an injunction should not issue as a matter of course on this issue and the Court must undertake an equitable analysis. Based on the evidence presently before the Court there appears to be little threat of irreparable injury from failure to immediately provide financial assurance. After all, defendants are required to immediately implement the approved closure plan. The public interest will be protected by implementation of the closure plan and plaintiffs may have an adequate remedy at law in the form of a money judgment. This matter is scheduled for trial beginning on February 4, 1991, and at this time one of the main issues before the Court will be defendants' failure to provide financial assurance. The Court expects that defendants will come forward with more reliable evidence of their respective financial situations than they have presented at this juncture.

C. Compliance With Liability Requirements

Plaintiffs also request that the Court order defendants to fulfill their liability requirements pursuant to 40 C.F.R. § 265.147. This issue is almost identical to the financial assurances issue discussed above. Although the

Court is not satisfied with defendants' contention that they are not able to meet this responsibility, this requirement is not of the same urgency as the issue of closure. Again, plaintiffs may have an adequate remedy at law and based on the evidence presently before the Court a balance of the equities appears to weigh in defendants' favor. Resolution of this issue will await trial.

D. Compliance With Groundwater Monitoring Requirements

Plaintiffs' final request is for an order compelling defendants to comply with RCRA's groundwater monitoring requirements pursuant to 40 C.F.R. Part 265 Subpart F. From the Court's previous finding of liability, it is clear that defendants are required to implement a groundwater monitoring system. Under an equitable analysis of the present situation the issuance of an injunction in favor of the plaintiffs would now be warranted except for an issue of fact that has yet to be resolved.

Defendants claim that an adequate groundwater monitoring and purge system was installed at the Richland facility this past year. Apparently this system was installed pursuant to a 1984 state court order arising out of earlier state court litigation. In support of this assertion defendants offer the affidavit testimony of Nathan B. Driggers, corporate counsel for PPP. He contends that the installed system was approved by the MDNR, and defendants imply in their brief (although they do not state outright) that the system satisfies RCRA. Although plaintiffs correctly argue that compliance with the state order does not excuse compliance with RCRA, it would be

inequitable to order defendants to do duplicate work. Plaintiffs' basis for their assertion that no groundwater maintenance system has yet been installed is a July 31, 1989, MDNR report. Given Driggers' affidavit asserting that a system was installed in 1990, questions of fact remain as to the existence of the system and its adequacy under RCRA. Plaintiffs do not rebut defendants' evidence that this new system has been installed and that it fulfills the RCRA requirements. Accordingly summary judgment on this issue is inappropriate.

IV.

For the reasons stated above, plaintiffs' motion for partial summary is granted in part and denied in part. Plaintiffs are ordered to provide this Court with a detailed proposed Order granting a permanent injunction as to defendants' implementation of the 1988 approved closure plan and compliance with RCRA's closure provisions, in accordance with the foregoing opinion. The proposed Order should specify exactly what activities defendants are required to undertake and should incorporate the terms and timetable of the approved closure plan.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: January 24, 1991

FOOTNOTES

[1] Marguerite Ladney and the government have reached a stipulated settlement and the claims against her have been voluntarily dismissed. References to "Ladney" refer to defendant Michael J. Ladney, Jr. and not to defendant Marguerite Ladney.

[2] Although the May 14, 1990, opinion does not discuss MCP's liability, the Court is informed that MCP will stipulate to its liability. Accordingly, the only issue remaining in this action is the appropriate relief to be assessed against Ladney, PPP, and MCP.

[3] RCRA further states:

> The Congress hereby declares it to be the national policy of the United States that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902(b).

[4] Section 1004 of RCRA provides:

> (5) The term "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment

> when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). Pursuant to the requirements of Section 3001 of RCRA, the Administrator has promulgated regulations identifying hazardous waste characteristics and specific hazardous wastes. 40 C.F.R. § 261, subparts C and D.

[5] 40 C.F.R. § 265.111 requires that a hazardous waste management facility must be closed in a manner that:

> (a) Minimizes the need for further maintenance, and
>
> (b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and
>
> (c) Complies with the closure requirements of this subpart.

[6] Defendants maintain that they are entitled to have a money judgment, rather than an injunction, entered against them in order that their contribution claims against various third-parties may survive. However, there is no reason to believe that any valid contribution claim will be prejudiced by granting injunctive relief. Defendants may pursue these claims in separate proceedings. In any event, the availability of RCRA's remedies do not hinge on a defendant's ability to seek contribution.

[7] Despite defendants' assertion that the Court must "believe" what is stated in the affidavit, taken at face value the affidavit is worthless. Hinsberg did not conduct an audit of PPP or Ladney. The basis for his conclusion

that defendants do not currently have $2,300,000 is a letter from Ladney and information he received from unnamed PPP Personnel. In other words Hinsberg's affidavit is based solely on unsubstantiated information provided by defendants. He even states, "None of the aforementioned financial information from Mr. Ladney and PPP has been audited, reviewed or compiled by me in accordance with generally accepted accounting principles and *I do not express any form of assurance on it*" (emphasis added). If defendants' own expert witness cannot attest to the truth of what he asserts, the Court is perplexed as to why it must "believe" the affidavit.

[8] Given several misstatements of fact contained in his affidavit, it is unclear whether Waybrant's testimony refers to the approved closure plan. Plaintiffs offer the theory that he is relying on PPP's proposed amendments which were received and rejected by the EPA in the fall of 1989. PPP never undertook an appeal from the rejection of these amendments, and so they are irrelevant at this point.

[9] Defendants raise two additional objections to ordering closure of the Richland facility, neither of which has merit. First, they contend that their compliance with the state court order and inability to provide financial assurance are mitigating circumstances to consider in granting the appropriate relief. Although the Court determined in its May 14, 1990, opinion that these circumstances may be considered in fashioning the appropriate relief, at a minimum PPP and Ladney are strictly liable for closure of the facility. The Court cannot order the defendants to do less than RCRA minimally requires. If mitigation is warranted, it may only be considered in assessing monetary fines and/or money damages at trial.

Second, defendants argue that providing financial assurance is a prerequisite to closure. Because they have

not provided financial assurance they contend they cannot be compelled to close the facility. Defendants are in error. Although financial assurance is an important part of the RCRA's statutory and regulatory scheme, it is not a necessary prerequisite, either logically or within the Act's framework, to implementation of an approved closure plan. If the statute required otherwise, closure could easily be avoided by any defendant claiming to have inadequate funds. Congressional intent is clear that closure, not financial assurance, is the overriding concern of RCRA.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

/

File No. K87-138 CA

Hon. Benjamin F. Gibson

OPINION

This is an environmental enforcement action brought pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6928(a) and (g), and Section 48 of the Michigan Hazardous Waste Management Act ("MHWMA"), 1979 P.A. 64, as amended, Mich. Comp. Laws §§ 299.501 *et seq.* Plaintiffs United States of America *et al.* seek permanent injunctive relief and the imposition of civil penalties against the defendants Production Plated Plastics ("PPP"), Michigan City Plastics ("MCP"), and Michael J. Ladney ("Ladney").

The lawsuit has a lengthy procedural history. On May 14, 1990, this Court determined that defendants Ladney and PPP operated a hazardous waste facility and stored hazardous waste at an electroplating plant located

at 9899 East D. Avenue, Richland, Michigan (the "Richland facility"), in violation of RCRA and MHWMA.[1] Defendants stipulated that MCP was jointly and severally liable for these violations as an owner and operator of the Richland facility. By Opinion and Order dated January 24, 1991, this Court determined that PPP, MCP, and Ladney were responsible for final closure of the Richland facility pursuant to the terms of a closure plan approved by the Michigan Department of Natural Resources ("MDNR").[2] Defendants were ordered to comply with the terms of the approved closure plan. That order was later revised to account for the submission by defendants and the approval by the MDNR of an amended closure plan. Revised Order of Permanent Injunction, June 19, 1991. The January 24, 1991, Opinion and Order left four issues for resolution at trial:

1. Whether an injunction should issue against defendants requiring them to comply with the groundwater monitoring requirements of 40 C.F.R. Part 265 Subpart F;

2. Whether an injunction should issue against defendants requiring them to provide financial assurances for closure and postclosure in accordance with 40 C.F.R. §§ 265.143 and 265.145;

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[1] This Opinion is published at *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich. 1990).

[2] This Opinion is published at *United States v. Production Plated Plastics, Inc.*, 762 F. Supp. 722 (W.D. Mich. 1991), *aff'd*, 955 F.2d 45 (6th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3829 (U.S. May 20, 1992) (No. 91-1869).

3. Whether an injunction should issue against defendants requiring them to comply with the financial responsibility (liability) requirements of 40 C.F.R. § 265.147; and

4. Whether, and in what amount, a civil penalty should be assessed against defendants pursuant to Title 42 United States Code Section 6928(g).

The first issue left for trial was resolved by the Court's Revised Order of Permanent Injunction which required defendants to undertake the groundwater monitoring required by RCRA and included in their amended closure plan. Another issue for trial arose, however, in that defendants have failed to comply with the Court's Revised Order of Permanent Injunction. Following a two-week bench trial on all remaining issues, the Court makes these findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

I.

PPP and MCP are part of a group of companies referred to as the Detroit Plastics Molding or "DPM" Group. At one time, the DPM Group was the world's largest privately owned plastic molding injection company. The DPM Group was incorporated by Ladney in 1963. From that time until the majority of the DPM Group was sold in 1989, Ladney controlled the group of companies as a single corporate entity. He was the majority shareholder of all the group's affiliated companies and he managed their affairs out of a central headquarters. Ladney selected all of the directors and officers for DPM Group companies. The DPM Group provided accounting,

financial planning, computer support, payroll, engineering, and sales services to all of the companies under its umbrella. In addition, Ladney's personal assets as well as the assets of the various corporations within the DPM Group were commingled. Assets within the group were channelled wherever they were needed without regard to the corporate form. For financing purposes the DPM Group's creditors treated the companies and Ladney as a single entity, with corporate and personal assets serving as collateral for loans secured by the DPM Group.[3]

In 1969, the DPM Group acquired the Richland facility from Amerace Corporation.[4] PPP was formed as a new corporate entity engaged in the business of electroplating plastic parts, mainly for the automotive market. In 1982, the DPM Group purchased MCP and made PPP a subsidiary of that company. PPP operated the Richland facility from 1969 until 1989, at which time it closed for lack of business. In 1989, the bulk of the DPM Group of companies was sold for between $28 and $33 million.

As part of its electroplating process, PPP operated two seepage lagoons, or surface impoundments, into which it discharged treated sludge and process water from the electroplating process. The lagoons were designed to allow water to seep directly into the upper

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[3] At one point during the course of this litigation, defendants argued that the DPM companies were all alter egos of one another. *See* Defendants' January 2, 1991, Brief in Opposition to Marguerite Ladney's Motion to Dismiss at 4.

[4] Defendants have filed a complaint against Amerace Corporation seeking contribution for the costs associated with the present action.

groundwater aquifer underneath the Richland facility. Chrome, nickel, and copper precipitated out of the water and formed a sludge which is harmful to humans and the environment.[5] The lagoons were operated pursuant to a discharge permit issued by the MDNR. On numerous occasions during its operation, PPP exceeded the allowable limits for the discharge of nickel and chrome permitted under its discharge permit. In 1974, the larger of the two lagoons became choked with sludge. Pursuant to MDNR direction, PPP removed the excess sludge and buried it on its property at the Richland facility.

In 1977, excessive amounts of hexavalent chromium were discovered in the groundwater of the upper aquifer underlying the Richland facility. Chromium is a human carcinogen. It can cause liver and kidney damage in humans. Other symptoms of chromium toxicity include internal bleeding, skin irritation and dermatitis, and respiratory distress. The most toxic form of chromium is hexavalent chromium. It is a danger to both human beings and the environment.

When the hexavalent chromium was discovered, the State of Michigan sued PPP in state court and in August

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[5] Electroplating sludge is a "listed F006" waste under RCRA. 40 C.F.R. § 261.31. That means the sludge is considered to be *per se* hazardous waste. 40 C.F.R. § 261.30. Electroplating sludge from the Richland facility also qualifies as a "characteristic" waste under the RCRA regulations. In other words, the waste is of such a high EP toxicity level that it has the characteristics of a hazardous waste. *See* 40 C.F.R. § 260.22.

of 1978 the parties entered into a consent judgment. Pursuant to the consent judgment, PPP provided clean drinking water wells for six residences affected by the contaminated plume of water. PPP agreed to remove the sludge from the lagoons at the rate of 120 cubic yards of sludge per month. In addition, PPP agreed not to place any more sludge in the lagoons. Accordingly, after August of 1978, only process water was placed in the impoundments. Nevertheless, chrome and nickel continued to precipitate out of the process water in the lagoons and form sludge. PPP continued to operate the lagoons until late 1987 when sewer hookup was achieved.

Also by the terms of the consent judgment, PPP undertook to conduct a hydrogeological study of the affected aquifer. Numerous monitoring wells were drilled and a consultant was retained to prepare and submit quarterly groundwater monitoring reports on behalf of PPP. The groundwater reports prepared on behalf of PPP evidence a contaminated plume of groundwater originating at the Richland facility. The plume contains both hexavalent chromium and nickel in concentrations exceeding the safety levels prescribed by the U.S. EPA.[6] Concentrations of chromium and nickel exceeding 100 parts per billion ("ppb") are considered unsafe. Groundwater data from a monitoring well near the Richland facility's lagoons and buried sludge pile shows hexavalent chromium levels ranging from 53 ppb to 2,350 ppb from May 1980 to June 1983. Groundwater data from the

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[6] Like chromium, nickel is a hazardous material that can cause harm to the liver and kidneys. It is toxic both to humans and the environment.

same monitoring well showed levels of nickel contamination ranging from 170 ppb to 1,660 ppb from March 1980 to January 1984.

There is a direct hydraulic connection between the seepage lagoons and the affected aquifer. The Court finds that the seepage lagoons and buried sludge on the site are a significant source of the contamination in the aquifer. Accidental spills in or near the factory also have contributed to the excessive levels of hexavalent chromium.

In addition to preparing the quarterly groundwater monitoring reports, five purge wells were installed and a purge and treat system was operated by PPP until November of 1991.[7] At that time, the State of Michigan took over operation of the system. The purge and treat system has stopped the spread of the contaminated plume of water in the aquifer and maintained it these past 14 years at a size of roughly 92 million gallons. The purge and treat system cost PPP roughly $500,000.00 per year to operate.

II.

RCRA was enacted in 1976. On December 18, 1978, the United States Environmental Protection Agency ("U.S. EPA") promulgated proposed national standards for the location, design, operation, closure, and post-closure care of hazardous waste treatment, storage, or disposal facilities. At this time defendants were owner/operators of a regulated facility, i.e., the Richland facility.

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[7] The purge and treat system was shut down by order of the state court from August 1985 through November 1987.

In May of 1980, U.S. EPA promulgated regulations which required owner/operators to either design, construct, and implement a groundwater monitoring program or certify RCRA closure of the facility by November 18, 1981. At the same time the U.S. EPA established a permit program for regulated facilities which required the facilities to either obtain a permit for continued operation, obtain so-called "interim status" for continued operation, or cease activity by November 18, 1981. Defendants did not comply with the groundwater monitoring requirements of RCRA although they did obtain interim status to continue operation of the Richland facility.

In April of 1982, U.S. EPA required that by July 7, 1982, regulated facilities were to either establish and fund financial assurance mechanisms for assuring the closure of the facility or certify closure of the facility prior to the same date. Owner/operators were given five alternative mechanisms for complying with these regulations: 1) a trust fund; 2) a surety bond; 3) a closure letter of credit; 4) a closure insurance policy; and 5) a financial test and corporate guarantee. Defendants investigated the possibility of obtaining closure insurance but determined that it was impossible for them to obtain such insurance. They took no further steps to comply with the regulations and the Richland facility remained in operation.

In April of 1982, U.S. EPA also promulgated rules requiring owner/operators to establish and fund financial liability coverage mechanisms for possible liability to third parties. Owner/operators had the choice of obtaining insurance coverage, meeting a financial test, or a

combination of the two. After November 1987, the mechanisms available for financial liability coverage were identical to those for financial assurances. Defendants failed to comply with these requirements.

The groundwater monitoring, financial assurance, and financial liability requirements are central to RCRA's objective of assuring safe disposal of hazardous wastes and paying for the closure of hazardous waste facilities through the resources of owner/operators. *See* 42 U.S.C. § 6902(a) (objectives of RCRA are to "promote the protection of health and the environment and to conserve valuable resources"). The groundwater monitoring requirement provides U.S. EPA with a vehicle for identifying the gravity and extent of any groundwater contamination. The financial assurances requirement provides a source of income for final closure of a regulated facility. The financial liability insurance requirement provides protection for any third parties injured as a result of pollution at an RCRA site.

RCRA was amended in 1984. A major goal of the amendments was to limit the interim status period of facilities such as the Richland facility. To that end, Congress provided that if owner/operators of an interim status facility could not certify full compliance with the financial responsibility and groundwater monitoring requirements of RCRA, the facility's interim status would be terminated. Owner/operators who did not comply with RCRA were required to cease operations of their hazardous waste facilities by November 8, 1985, and submit the facility's final closure plan no later than November 23, 1985.

Defendants did not comply with the RCRA amendments. They continued operation of the Richland facility's seepage lagoons until December 7, 1987. The U.S. EPA did not receive a copy of the Richland facility's closure plan until May 20, 1986. To date, defendants have not complied with either the financial assurance or the financial liability requirements of RCRA. Defendants did not submit an RCRA compliant groundwater monitoring plan until May 21, 1991, and to date they have failed to implement that plan.[8] The Court finds that defendants were well aware of the various RCRA deadlines and they failed to meet those deadlines in violation of federal law.

Because the defendants continued to operate the Richland facility in violation of RCRA and failed to comply with the numerous RCRA regulations, the U.S. EPA initiated an administrative enforcement action. Judge Borsos, the state court judge overseeing the state consent judgment, attempted to have the administrative law judge handling the enforcement action defer to the state court consent judgment. Judge Borsos's concern was that the cleanup of the Richland facility needed to strike an "appropriate balance between the environment and the continued operation of the facility and the 400 jobs which the company provides to the community." Defendant's

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[8] For the purposes of the penalties portion of this trial, the Court will only consider violations of the groundwater monitoring requirement after January of 1991. It was at that time that defendants were first notified that plaintiffs were seeking penalties for noncompliance with this element of RCRA.

Exhibit A.41.[9] By letter dated July 16, 1986, U.S. EPA seemed to be willing to accept the rate of sludge removal from the lagoons contained in the state consent judgment (*i.e.*, 120 cubic yards per month). Attempts to settle the matter and coordinate the state and federal enforcement actions proved fruitless though, and on March 4, 1987, U.S. EPA moved to dismiss the administrative action without prejudice to the commencement of a civil lawsuit in federal district court. This action was commenced on March 31, 1987.

Following this Court's Order of Permanent Injunction, plaintiffs undertook a large scale cleanup operation of the Richland facility. Nevertheless, closure of the facility remains incomplete. The testimony at trial established that there is still some 200 cubic yards of sludge on the property. Likewise, 2000 cubic yards of contaminated soil remains on the property. Kenneth Waybrandt, defendants' environmental expert, estimated the total cost for the removal of the remaining sludge and contaminated soils at $400,000 to $500,000. In addition, he estimated the cost of certifying that closure was complete to be about $100,000. In total, since 1986, defendants have expended in excess of $4.5 million cleaning up the Richland facility pursuant to the state consent judgment and this federal action. They have also expended $500,000 per year operating the purge and treat system for the years that system was in operation.

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[9] Judge Borsos's concern is evident in a January 24, 1990, order in which PPP is instructed to "continue to operate its facility in Richland, Michigan to the fullest extent possible."

Due to their failure to comply with RCRA, defendants received a significant economic benefit. Plaintiffs' expert witness, Gail Coad, testified at trial that the economic benefit gained by defendants exceeded $1.4 million. Her testimony was highly credible. The Court finds that in total defendants derived an economic benefit of at least $1 million through their failure to timely comply with the statute. This figure takes into account the costs defendants would have incurred in operating the electroplating facility without violating RCRA as well as the value of the interest earned on money that was not invested in RCRA cleanup in 1985. The figure also discounts Gail Coad's estimate to give the defendants every benefit of the doubt on the cost estimates and discount rate utilized in the analysis.

III.

The main defense raised by the defendants for their failure to timely implement RCRA and its regulations is that at the time RCRA became effective, up until the present, defendants have not had the ability to pay for the costs of complying with the statute. In the same regard defendants contend that their alleged inability to pay should mitigate any penalty imposed by the Court at this time. The evidence at trial established to the contrary, however, that defendants have had and continue to have the financial ability to comply with RCRA and to pay a meaningful penalty for their noncompliance.

Specifically, in the time frame between 1985 and 1986, when the RCRA amendments became effective, Ladney's income tax returns show that he earned $3 million in

income and an additional $4 million in capital gains. During this time period Ladney had somewhere between $5 and $8 million worth of discretionary assets at his disposal. Rather than invest these assets in closure of the seepage lagoons and removal of the stockpiled and buried sludge at the Richland facility, Ladney chose to invest the money in speculative ventures including gas and oil exploration partnerships. Likewise, Ladney had available between $2.1 and $4 million worth of property he owned in Canada (the "Moore Township property"), which could have been liquidated to come up with the necessary funds for RCRA compliance. In addition, throughout the relevant time period, $2.8 million in assets were channelled away from PPP into other DPM Group corporations. Finally, Ladney and the DPM Group made a $1.85 million equity investment in a $70 million polypropolene factory. The factory was sold three years later for $115 million. Defendants' continued refrain that all their income and profits were paper income and profits, that no real assets were transferred by PPP or the DPM Group, and that they never had cash to comply with the statute is not credible. The Court is satisfied that the money was at hand.

Today PPP holds no assets. MCP owns a piece of property in Michigan City, Indiana, which is worth somewhere near $1.4 million. Ladney still owns the Moore Township property. It was valued by the DPM Group at $3.165 million in a 1989 annual report. Its present value is somewhere between $3.4 and $3.9 million. Although Ladney has pledged to sell this property to satisfy his RCRA responsibility, at last report the asking price for the land was in excess of $17 million. In addition, Ladney

owns a $1.5 million home in Naples, Florida. He also owns the Universal Production Plastics factory and land which is valued at $1 million. He owns land in Alliance, Ohio, which is valued at $1 to $1.5 million. He receives an income from Social Security, a pension, and a salary from his Milad partnership[10] totalling about $200,000 per year.

IV.

Defendants violated Sections 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and the RCRA regulations, 40 C.F.R. Part 265, by discharging hazardous waste into unlined surface impoundments and by operating waste piles without an RCRA permit or RCRA interim status. They also failed to submit required closure and postclosure plans and commence and complete closure of the Richland facility within the time periods required by RCRA Section 3005(e) and 40 C.F.R. §§ 265.112 and 265.118. These RCRA violations in turn amounted to violations of Sections 6 and 22 of HWMA, Mich. Comp. Laws. Ann. §§ 299.506 and 299.522, for the continued operation of an unlicensed hazardous waste storage and disposal facility.

Defendants have violated the terms of the Revised Order of Permanent Injunction by failing to complete soil

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[10] Ladney is the 99 percent owner of the Milad partnership which is engaged in the business of licensing a patent for "GAIN" technology. The partnership currently has a gross income of at least $875,000. It also has expenses of between $450,000 and $500,000 to pay for patent infringement litigation. In the past several years, Ladney has made significant capital contributions to Milad and various other limited partnerships.

removal and sludge excavation pursuant to the applicable closure schedule; failing to complete closure; failing to undertake soil sampling; failing to backfill, grade, and seed the excavated areas; failing to comply with the post-closure care requirements of RCRA and MHWMA; and failing to implement the MDNR-approved groundwater monitoring system at the Richland facility. Defendants have failed to meet the requirements of the financial assurance regulations found at 40 C.F.R. §§ 265.143 and 265.145. They have also failed to comply with the financial liability coverage regulations of 40 C.F.R. § 265.147. Plaintiffs are entitled to injunctive relief to cure all of these deficiencies. 42 U.S.C. § 6928(a); *United States EPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1621 (1991).

Plaintiffs have suggested to the Court that they would be satisfied with a permanent injunction requiring defendants' full compliance with all terms of the approved closure plan, the postclosure care requirements of 40 C.F.R. Part 265, and the provision of financial assurances for closure and postclosure care. In addition, although they are entitled to an order requiring defendants to comply with the financial liability coverage requirements, plaintiffs only seek an order requiring defendants to exercise "best efforts" to obtain and maintain liability coverage required by 40 C.F.R. § 265.147. Accordingly, an Order to that effect shall enter.

In fashioning the appropriate injunctive relief, the Court is mindful that defendants are already in violation of an Order of this Court. The Court is not going to undertake to micro-manage the defendants' compliance with its injunctive orders. Accordingly, defendants shall

have ninety days from the date of this Opinion to make themselves fully compliant with RCRA. At the expiration of ninety days, the State of Michigan shall certify to the Court whether the defendants are in full compliance. If.the defendants have failed to comply within ninety days, the Court will appoint a trustee recommended by the plaintiffs to operate the defendants' business and personal affairs and expeditiously liquidate whatever assets are necessary to provide funds for compliance. To that end, the plaintiffs are directed to prepare and submit a list of three recommended third-party trustees, among with the recommended trustees' qualifications, for this Court's review.

V.

The Resource Conservation and Recovery Act provides:

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

49 U.S.C. § 6928(g). Assessment of the amount of a civil penalty is committed to the informed discretion of the Court. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 230 n.6 (1975). Although RCRA does not specify what factors a Court should examine in arriving at an appropriate penalty, case law suggests that relevant considerations include the seriousness of the harm caused by defendants' violations, the scope of the violations, defendants' good faith in attempting to rectify the violations,

and the economic benefit accrued by defendants. *See, e.g., United States EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1242-5 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1621 (1991); *United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 322-23 (D.S.C. 1988), *aff'd in part*, 865 F.2d 1261 (4th Cir. 1988). In exercising its discretion, the Court is also mindful that a major purpose of a penalty is to deter others from the same or similar conduct. *E.g., United States v. Phelps Dodge Indus., Inc.*, 589 F. Supp. 1340, 1358 (S.D.N.Y. 1984).

Viewing all of the evidence in total, the Court, in its discretion, believes that a penalty of $1.5 million is appropriate in this case. The Court finds that the harm posed by the violations is serious and the scope of the violations is extensive. Certain circumstances the defendants have found themselves in tend to mitigate the amount of the penalty. For instance, defendants complied in good faith with the state court action and have expended at least $4.5 million in cleaning up the Richland facility since 1986. They have spent an additional $500,000 per year on a purge and treat system and remained in operation, at least in part, at the behest of the state court. On the other hand, on numerous occasions defendants have purposefully thwarted the effectiveness of the statute. Defendants have not exhibited good faith in attempting to raise funds for the cleanup of the facility, *e.g.*, by putting the Moore Township property on the market for an asking price of roughly five times its market value. They also have continued to contend that they lack the funds to pay for closure when it is clear that the necessary funds are readily available. On balance, the Court finds that there

are some limited mitigating factors which have been weighed in the Court's calculation to the extent they are relevant.

The major factors entering the Court's calculation are the economic benefit accrued by the defendants, the deterrent effect of the penalty imposed, and the Court's concern that the defendants must be able to comply with the Court's injunction and pay the penalty. A penalty of $1.5 million assures that the defendants will not have benefitted economically by failing to comply with RCRA. Likewise, the penalty is substantial enough to have a significant deterrent effect on these defendants as well as other RCRA owner/operators. Most important though, the $1.5 million penalty coupled with the costs of closure, postclosure care, and financial assurances will result in a cost to the defendants of roughly $4.5 million. Defendants currently have assets which can be liquidated to satisfy the requirements of this Court's Judgment. While the penalty is certainly large enough to hurt, there is no danger that the funds necessary for final closure will not be available or that defendants will not be able to pay the penalty imposed.

Finally, the Court notes that defendants have raised an Eighth Amendment defense to the assessment of a civil penalty. They also aver that the penalty should be offset by $60,000 which Ladney's ex-wife paid the plaintiffs in settlement of their lawsuit against her arising out of these same circumstances.[11] Both of these arguments are without merit.

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[11] Defendants also ask the Court to take this opportunity to reconsider its prior decision holding Ladney jointly and

The Eighth Amendment to the United States Constitution bars the imposition of "excessive fines." As a general rule, however, civil penalties designed with both retributive and deterrent goals in mind are not unconstitutional. *United States v. Halper*, 490 U.S. 435, 447-48 (1989). The civil penalty provision of RCRA is clearly intended to serve a deterrent purpose. Accordingly, there is no argument that it is *per se* unconstitutional. Likewise, the $1.5 million assessed in this case can in no way be said to be excessive. This penalty is in line with those imposed in numerous other environmental cases. *See, e.g., Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80-81 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) ($4.2 million penalty for violating Clean Water Act); *T & S Brass Works*, 681 F. Supp. at 322 ($2.8 million penalty for RCRA violation).

Mrs. Ladney was never adjudicated to be liable for the RCRA violations at issue in this action. Moreover, the Ladneys' judgment of divorce in the state court proceeding requires Ladney to hold her harmless for the pollution problem at the Richland facility. Judgment of Divorce at ¶ 45. The Court will not *pro rata* reduce defendants' penalty to account for Mrs. Ladney's settlement with the plaintiffs.

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severally liable for the RCRA violations. The Court stands by its earlier ruling.

VI.

For the reasons stated above, Judgment shall enter in favor of plaintiffs and against defendants PPP, MCP, and Michael Ladney jointly and severally.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: September 4, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

JUDGMENT

(Filed Sep. 4, 1992)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 4th day of September 1992.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated September 4, 1992, IT IS HEREBY ORDERED that within ninety days of the entry of this Judgment defendants shall achieve complete closure of the Richland facility pursuant to all terms of the approved closure plan, as referenced in the Revised Order of Permanent Injunction.

IT IS FURTHER ORDERED that upon completion of the closure of the Richland facility, if defendants cannot achieve clean closure of the surface impoundments, waste pile, and associated traffic-loading areas, as required by

RCRA, MHWMA, and the approved closure plan, defendants shall comply with the postclosure care requirements of 40 C.F.R. Part 265 and corresponding Michigan regulations.

IT IS FURTHER ORDERED that within ninety days of the entry of this Judgment defendants shall provide financial assurance in accordance with 40 C.F.R. §§ 265.143 and 265.145 and corresponding state regulations. Pursuant to 40 C.F.R. § 265.143(h), the financial assurance mechanism for closure shall remain in place until defendants submit and receive approval of a certification that all hazardous waste management units at the Richland facility have been closed in accordance with the approved closure plan.

IT IS FURTHER ORDERED that within ninety days of the entry of this Judgment the defendants shall provide financial assurance for the cost of postclosure care pursuant to 40 C.F.R. § 265.145.

IT IS FURTHER ORDERED that within ninety days of the entry of this Judgment, defendants shall implement and comply with the alternate groundwater monitoring program approved in April 1991, as referenced in the Revised Order of Permanent Injunction.

IT IS FURTHER ORDERED that defendants shall exercise their best efforts to obtain and maintain liability coverage required by 40 C.F.R. § 265.147 and corresponding Michigan regulations.

IT IS FURTHER ORDERED that within ninety days of the entry of this Judgment and every 180 days subsequent

thereto defendants shall provide to plaintiffs written certification of their good faith and best efforts to satisfy the requirements for liability coverage for sudden and nonsudden accidental occurrences. This requirement shall be in effect until defendants obtain and maintain the required liability coverage or are no longer required to maintain such coverage pursuant to 40 C.F.R. § 265.147(h), whichever occurs first. The certifications shall, at a minimum, include the following:

1. copies of each evaluation of each method for demonstrating the liability coverage required by 40 C.F.R. § 265.147 and corresponding Michigan regulations, including copies of each request or application for liability coverage under RCRA, by or on behalf of the defendants;

2. copies of all responses received to the requests or applications described above;

3. identification of the reasons for not obtaining the liability coverage for each method provided by 40 C.F.R. § 265.147;

4. a detailed description of measures taken and to be taken by defendants to meet any conditions for obtaining liability coverage; and

5. a statement by an authorized official that defendants exercised best efforts to obtain liability coverage required by 40 C.F.R. § 265.147.

IT IS FURTHER ORDERED that ninety days after the entry of this Judgment, plaintiff State of Michigan shall certify to this Court whether defendants are in compliance with the injunctive relief ordered by this Judgment.

IT IS FURTHER ORDERED that plaintiffs shall submit to the Court a list of three recommended third-party trustees along with those persons' qualifications to serve as trustee.

IT IS FURTHER ORDERED that if plaintiff State of Michigan certifies to the Court that defendants are not in compliance with the injunctive relief ordered by this Judgment, the Court shall appoint a trustee from among the three recommended by the plaintiffs. That trustee shall have the authority to manage all of the business affairs of the defendants and will be instructed to expeditiously liquidate whatever assets are needed to achieve compliance with the Court's injunction.

IT IS FURTHER ORDERED that defendants shall pay to plaintiffs a civil penalty in the amount of $1.5 million.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and FRANK J. KELLY, Plaintiffs, v. MICHAEL LADNEY, PRODUCTION PLATED PLASTICS, INC., and MICHIGAN CITY PLASTICS, INC., Defendants.	CIVIL ACTION NO. K87-138 CA JUDGE BENJAMIN GIBSON **POST-TRIAL ORDER DESIGNATING A THIRD-PARTY TRUSTEE** (Filed Dec. 10, 1993)

Consistent with the Judgment and Opinion of this Court entered on September 4, 1992 and the Federal Rules of Civil Procedure, and the Court being fully advised in the premises that the defendants have not complied with injunctive aspects of that Order more than ninety (90) days after it issued, the Court reaffirms and makes the following Findings and Order:

WHEREAS, this Court has found, based on evidence presented during a two-week trial, that defendants have had and continue to have the financial ability to comply with their environmental obligations in this case, and found that the value of defendants' assets, or assets under their control, substantially exceeds $6,000,000.00,

including realty or property (located in Ohio, Indiana, Florida and Ontario, Canada) and annual income relating to ongoing business operations, although the defendants have contended that assets may not be immediately convertible into cash. Opinion (September 4, 1992), pp. 12-14;

WHEREAS, evidence presented during the trial also indicated that liens that had been recorded regarding certain of the Defendants' assets long before the August 1991 trial in this case, and which remained recorded as of the date of the trial, would not serve as a substantive impediment to the liquidation of those and other assets in order to generate funds needed to finance compliance with all terms of the injunctive orders of this Court. For example:

1. A blanket lien on Canadian property owned by defendant Michael Ladney that had been recorded several years ago by Mitsui Co. as security for an obligation that was subsequently satisfied, and therefore dischargeable, may continue to appear as part of the title record.

2. Defendant Michael Ladney essentially transferred $1,400,000.00 from himself to himself as general partner and limited partner with a 99% controlling interest in Milad Partnership, which was formed after he had been held liable in this action. After arranging for the funds to be used to finance partial environmental remediation at the Richland facility, the Milad Partnership then recorded a lien on Mr. Ladney's Canadian property for $1,400,000.00. Accordingly, such a lien could readily be discharged to clear title, with cooperation from the defendants.

Opinion (Sept. 4, 1992), pp. 13-14; Trial Testimony of Michael Ladney, August 13, 1992, pp. 33-35.

WHEREAS, the Court believes that expeditious compliance with its Injunctive Relief Orders is feasible and appropriate;

WHEREAS, the Court has previously Ordered as follows:

> if plaintiff State of Michigan certifies to the Court that defendants are not in compliance with the injunctive relief ordered by this Judgment, the Court shall appoint a trustee from among the three recommended by the plaintiffs. That trustee shall have the authority to manage all of the business affairs of the defendants and will be instructed to expeditiously liquidate whatever assets are needed to achieve compliance with the Court's injunction.

Judgment (September 4, 1992), p. 3.

WHEREAS, the Court has further noted that:

> [i]f the defendants have failed to comply within ninety days, the Court will appoint a trustee recommended by the plaintiffs to operate the defendants' business and personal affairs and expeditiously liquidate whatever assets are necessary to provide funds for compliance.

Opinion (September 4, 1992), p. 16.

WHEREAS, the injunctive relief ordered by the Court is designed to assure that the defendants comply in full with hazardous waste management laws at a contaminated industrial facility which the defendants owned and operated in Richland, Michigan. The Court found "that

the harm posed by the violations [of those environmental laws] is serious and the scope of the violations is extensive." Opinion (September 4, 1992), p. 17.

WHEREAS, the Court finds that defendants have not complied in full with the injunctive relief set forth in the Revised Order of Permanent Injunction entered on June 19, 1991, nor with parallel injunctive relief set forth in the Judgment dated September 4, 1992. Plaintiff State of Michigan, through the Michigan Department of Natural Resources, has certified that the defendants are not in compliance with the injunctive relief; and

In accordance with Fed. R. Civ. Pro. 66 and 70, without limitation, and the inherent authority of the Court to fashion equitable relief and enforce its prior Orders,

IT IS HEREBY ORDERED:

1. Appointment of a third-party trustee ("Trustee") is necessary and appropriate to achieve expeditious compliance with all terms of the injunctive relief required under the September 4, 1992 Judgment.

2. The Court has reviewed materials that the plaintiffs have filed concerning appointment of a Trustee and has heard evidence during a two-week trial that addressed, in part, enforcement of the Revised Order of Permanent Injunction and the need for additional injunctive relief.

3. a. The Court appoints The Environmental Trust Group, Inc., to serve as Trustee to review, marshall, liquidate, and dispose of, consistent with applicable law, any or all personal and business affairs, operations, properties and assets owned, controlled or held for the benefit

of any defendant that the Trustee believes are needed to assure complete, expeditious compliance with injunctive relief ordered in this case (collectively, "the Assets"). Through this appointment, the Trustee shall have authority to act as an adjunct to the Court, and in a capacity of a Court-appointed receiver, with duties and powers described further herein and in a Trust Memorandum to be entered by the Court.

b. The Trustee is authorized, without limitation, to review and, as needed, approve, disapprove or redirect any aspect of the defendants' business operations. If the defendants contend that by exercising such authority, the Trustee will unduly interfere with their business operations, they may seek an expedited ruling from the Court to resolve the matter.

c. The Trustee is appointed to serve in this capacity until the Court finds, based on certification by plaintiff State of Michigan, that the defendants have fully complied with the injunctive relief required under the Judgment, or the Court otherwise discharges or terminates the Trust (*e.g.*, pursuant to terms of a Trust Memorandum).

4. After consulting with the Trustee and the defendants, the plaintiffs shall seek approval by this Court of a Trust Memorandum. Its purpose shall be to establish procedures by which the Trustee shall marshall assets needed to achieve compliance with the Court's injunction. Without limitation, the Trust Memorandum shall authorize the Trustee:

a. to maintain each defendant's businesses and properties, insofar as those Assets are needed to

assure compliance with injunctive relief ordered by the Court, until they are sold, conveyed or otherwise liquidated for value in accordance with terms of this Order and a Trust Memorandum to be approved by this Court, as described below;

b. as necessary to fund expeditious compliance, to pursue and arrange for the sale of as much of the defendants' Assets as may be salable, whether to a single buyer or several buyers. Whether at the Trustee's request or by Order of the Court, and consistent with terms to be entered through a Trust Memorandum, the defendants shall cooperate with the Trustee in arranging each such sale. Before finalizing arrangements for such sales, the Trustee shall endeavor to obtain the approval of any defendant holding an ownership interest in the Asset to be sold (*e.g.*, by providing the defendant with written notice at least twenty days prior to the proposed sale); and

c. to distribute the proceeds of such sales in accordance with the Trust Memorandum in order to assure that the defendants comply with this Court's injunction.

5. Upon execution of the Trust Memorandum, the Trustee shall liquidate expeditiously the Assets, wherever located, under control of any defendant, as needed to achieve compliance with the Court's injunction. Prior to any such liquidation, the defendants shall receive notice of the proposed liquidation. If the defendants object within fifteen days, the Trustee will refrain from liquidating the Assets until the Court has ruled.

6. The Trustee shall have authority to receive, preserve, lease, protect and dispose of the Assets, or any part thereof, including authority to operate businesses or partnerships, or other entities under control of any defendant.

a. To the extent the Trustee operates businesses, partnerships, or other entities under control of any defendant, the Trustee shall be accorded the same authority that a corporate charter, partnership agreement, other operative document or arrangement signifying an ownership interest accords to the defendant, by virtue of the powers vested in it by the Court and as further described in the Trust Memorandum.

b. The Trustee shall obtain authorization from the Court before liquidating any asset that the Trustee reasonably believes to be a "personal effect" Asset of Mr. Ladney.

c. Before finalizing arrangements for the sale of any real property below a then-current appraised value that the Trustee has obtained, if any, the Trustee shall seek approval of the Court and explain the propriety of such action.

7. The authority of the Trustee is subject to the terms of this Order. The Trustee is authorized to act at once, without security, until further order of this Court and before entry of a Trust Memorandum. The Trustee shall demonstrate and maintain liability coverage, bonding or similar assurance of coverage, concerning the effect of misfeasance, nonfeasance or malfeasance.

8. If the Trustee determines that circumstances warrant immediate action to arrange financing and raise capital to assure defendants' expeditious compliance with the injunctive relief ordered in this case, then prior to completing such arrangements, the Trustee shall provide the defendants with fifteen days prior notice of the proposed arrangements, seek the consent of the defendants, and, if such consent is not forthcoming within fifteen days, seek a hearing before this Court. Notwithstanding this provision, circumstances may justify a more expedited process in which to address the defendants' concerns.

9. The powers and authority of Trustee shall include, without limitation, the following:

a. The Trustee may employ and retain such agents, assistants, counsel, professionals or employees as the Trustee may consider necessary for the purposes of managing, receiving, protecting, preserving and realizing upon the Assets and otherwise fulfilling the purpose of the Trust as set forth in the Trust Memorandum and this Order.

b. The Trustee shall determine the terms on which sale of respective Assets, or portions thereof, is feasible to persons or entities other than the defendants.

c. By December 31, 1993, the Trustee shall provide this Court with an estimate of the Trustee's fees and disbursements, including legal fees and other expenses, including reasonable costs incurred by the Trustee in connection with the development, preparation and execution of the Trust Agreement.

d. The Trustee shall make an initial report to the Court no later than January 21, 1994, concerning the prospects for disposing of Assets and concerning the Trustee's operations and expenses.

10. a. Without express written approval of the Trustee, neither defendants nor any agent or entity under direction or control of any defendant may encumber, alienate or otherwise cloud the title of any of the Assets. Each defendant and its counsel, employees, agents, and entities over which it has control shall fully cooperate with the Trustee and provide access to and information concerning all books, records, documents and operations relating to the Assets, wherever located. Expenditures that need not be conditioned on prior approval of the Trustee (*e.g.*, reasonable maintenance, tax, utility, insurance and personnel payments, as well as Mr. Ladney's reasonable personal living expenditures) shall be described in the Trust Agreement, which shall also set forth the requirements for reporting such expenditures.

b. If any defendant asserts that a document is protected by the attorney/client privilege, that defendant may promptly seek leave of the Court to limit production of said document, but no document shall be destroyed. The Trustee may seek an expedited ruling from the Court concerning the need for the Trustee to review or take possession of a copy of any document for which defendants assert the attorney/client privilege, and the terms for limiting its disclosure beyond the Trustee. The Court shall then issue a ruling as to whether the attorney/client privilege pertains and, if so, whether or how to lift it.

11. Expenditures which the Trustee shall properly make or incur, together with the Trustee's payment, shall be allowed to it based upon its submission of accounts each calendar quarter and receiving approval from this Court therefor, and as further set forth in a Trust Memorandum to be entered by the Court hereafter. The defendants shall submit any objections concerning the Trustee's accounts and payment within fifteen days after the Trustee submits the accounts.

12. Prior to submitting accounts, the Trustee from time to time may direct reasonable amounts (*e.g.*, up to an aggregate of $25,000) from balances under its control for payment of its fees and disbursements, as further delineated in a Trust Memorandum. When filed, the amounts so applied shall constitute advances against the payment of the Trustee. Each advance shall be reflected in a final accounting when the Trustee passes accounts before the Court.

13. The Trustee need not take action until the Trustee shall be in receipt of adequate initial operational funding, which shall be used for operating the Trust (including but not limited to administrative expenses, costs of insurance and expenses of complying with this Order and any approved Trust Agreement) for the period through the first 120 days of operation. If a plaintiff advances funding at any time for purposes of having the Trustee execute its duties, the plaintiff may later collect reimbursement in that amount out of the operating Trust fund.

14. If at any time the Trustee determines that it does not possess sufficient funding to carry out any of its

required duties under this Order or an approved Trust Agreement and believes that the above specified funding procedures would not likely result in timely receipt of the necessary funding, the Trustee shall simultaneously notify the plaintiffs, defendants and this Court of the amount of funds needed, as well as the purposes and urgency thereof.

15. Subject to the provisions of this Order, including paragraph 11, the defendants shall not object to the Trustee obtaining payment, or impede the Trustee's payment, for approved expenditures.

16. From time to time and after three days' notice to the other parties, the Trustee, plaintiffs or defendants may apply to this Court for direction and guidance in the Trustee's discharge of its duties pursuant to this Order.

IT IS SO ORDERED:

December 10, 1993
DATE

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
UNITED STATES
DISTRICT COURT
JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, and FRANK J. KELLEY, Attorney General for the State of Michigan ex rel. MICHIGAN NATURAL RESOURCES COMMISSION and GORDON E. GUYER, Director of the Michigan Department of Natural Resources, Plaintiffs, v. PRODUCTION PLATED PLASTICS, INC., MICHAEL LADNEY, MICHIGAN CITY PLASTICS, INC., Defendants.	CIVIL ACTION NO. K87-138CA HON. BENJAMIN F. GIBSON MEMORANDUM CONCERNING APPOINTMENT OF THE THIRD-PARTY TRUSTEE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, and FRANK J. KELLEY, Attorney General for the State of Michigan ex rel. MICHIGAN NATURAL RESOURCES COMMISSION and GORDON E. GUYER, Director of the Michigan Department of Natural Resources, Plaintiffs, v. PRODUCTION PLATED PLASTICS, INC., MICHAEL LADNEY, MICHIGAN CITY PLASTICS, INC., Defendants.	CIVIL ACTION NO. K87-138CA HON. BENJAMIN F. GIBSON MEMORANDUM CONCERNING APPOINTMENT OF THE THIRD-PARTY TRUSTEE

THE COURT FINDS AS FOLLOWS:

1. The Court has found each Defendant jointly and severally liable for violations of the environmental laws of the United States and Michigan and issued a Revised Order of Permanent Injunction, dated June 19, 1991 (published at 742 F. Supp. 956, and 762 F. Supp. 722, *aff'd per curiam*, 955 F.2d 45 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 67, 61 U.S.L.W. 3256 (U.S. 1992), that required compliance with regulations regarding proper management of hazardous waste that they have treated, stored or disposed

of at their land disposal facility in Richland, Michigan (the "Richland facility");

2. In a Judgment and Opinion dated September 4, 1992, and issued after a two-week trial, the Court found that the Defendants had not complied in diverse respects with the Revised Order of Permanent Injunction. The Court further found that the Defendants own, and at relevant times have owned, a wide array of assets whose value substantially exceeds six million dollars ($6,000,000.00) and which the Defendants could have used to finance compliance with injunctive relief ordered in this case;

3. In the Judgment and Opinion, the Court expressed an intent to appoint a trustee to marshall the Defendants' personal and business assets if, after ninety (90) days from the date of the Judgment and Opinion, the Defendants failed to comply timely with all aspects of the injunctive relief that the Court ordered, provided plaintiff State of Michigan certified such noncompliance to the Court. The State of Michigan has so certified repeatedly;

4. At a hearing on July 9, 1993, the Court found that the Defendants did not comply in substantial respects with injunctive relief set forth in the Judgment dated September 4, 1992. The Court announced that The Environmental Trust Group, Inc., of Cambridge, Massachusetts, would serve as the Trustee (the "Trustee") to assure that funds are in place to enable the Defendants to come into compliance with all terms of the injunctive relief.

5. This appointment was confirmed in the Post-Trial Order Designating Third-Party Trustee ("Post-Trial

Order"), dated November ___, 1993. The Post-Trial Order outlined areas of the Trustee's authority, various duties of the Trustee and certain procedures for administering those duties. Without limitation, it provided that the Trustee would implement the terms of this Trust Memorandum and establish general procedures by which the Trustee shall marshall and liquidate assets needed to finance compliance with the injunctive relief.

6. The equitable remedy fashioned through the Post-Trial Order and this Trust Memorandum is pursuant to and in conformity with this Court's authority under Federal Rules of Civil Procedure 66 and 70, to assure that the Defendants comply with their environmental obligations in this action.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

This Trust Memorandum shall have the force of law, shall be interpreted consistently with terms of the Post-Trial Order, with any inconsistencies resolved by the terms of this Trust Memorandum controlling the interpretation, and the Defendants are ordered to cooperate fully with the Trustee as an adjunct and officer of the Court, as follows:

DEFINITIONS

As used in this Trust Memorandum, the following terms shall have the following meaning:

"Administrative Court Registry Account" shall mean the administrative escrow account established for the purpose of receiving, holding and disbursing funds for

payment to the Trustee for past, present and prospective operating expenses for performance of its duties.

"Assets" shall mean any and all personal and/or business affairs, operations, properties (*e.g.*, real, intellectual or any other type of property interest), and assets held, owned or controlled directly or indirectly by or for the benefit of any Defendant, or in which any Defendant has a beneficial or possessory interest.

"Court" shall mean the United States District Court in the Southern Division of the Western District of Michigan, which has issued the Injunctive Relief Orders in this action.

"Defendants" shall mean Michael Ladney, Production Plated Plastics, Inc., and Michigan City Plastics, Inc., each held jointly and severally liable for violations of federal and state environmental laws in this action and ordered to comply fully with such laws;

"Escrow Trust Fund" shall mean the fund established for the purpose of receiving, holding and disbursing proceeds from the Trustee's marshalling and liquidation of Assets to fund the performance of the Work consistent with the approved Work Schedule and Funding Plan, including, without limitation, financial responsibility measures (*i.e.*, financial assurance for closure and post-closure care, and the Defendants' liability coverage obligations) as required in the Injunctive Relief Orders and by hazardous waste laws of the United States and Michigan, and, if needed, to fund the Trustee's activities where funds in the Administrative Court Registry Account are inadequate.

"Funding Call" shall mean the estimate of the Trustee's costs associated with fulfilling its duties for any calendar quarter, submitted to the Court for its approval 30 days prior to the succeeding calendar quarter, with copies provided to the Plaintiffs and Defendants. The Funding Call shall not include the Trustee's own fees or overhead for normal operating procedures (*e.g.*, telephone calls and administrative assistance).

"Funding Plan" shall mean a document approved by the State of Michigan that sets forth the timing and amount of funds required to implement the "Work Schedule" (as defined below).

"Injunctive Relief Orders" shall mean the Orders entered by the Court including: 1) the Revised Order of Permanent Injunction; 2) the Judgment and Opinion dated September 4, 1992; 3) the Preliminary Injunction dated November 15, 1993; 4) the Post-Trial Order Designating A Third-Party Trustee (including compliance with all applicable closure requirements, post closure care requirements, alternate groundwater monitoring program and good faith efforts of the Defendants to secure and maintain liability coverage) and this Trust Memorandum.

"Notice" shall have the meaning and is used herein as notice given by: delivery in hand; by telecopier; by reliable overnight delivery service; and/or by certified mail, return receipt requested wherein such Notice is given to the parties at the following addresses or to such other address set forth in a written Notice from any one of the following parties to the other in accordance herewith:

To: U.S. District Court
Western District of Michigan Southern Division
616 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503
Attention: Honorable Benjamin F. Gibson

To: Plaintiff U.S. Government
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044
Attention: Elliot Eder
(overnight delivery, to 1425 New York Avenue, N.W., Rm. 13073; Washington, D.C. 20005)

To: Plaintiff U.S. Government
U.S. EPA, Region 5
Office of Regional Counsel (CS-3T)
77 West Jackson Blvd.
Chicago, IL 60604-3590
Attention: Stuart Hersh, Asst. Regional Counsel

To: Plaintiff State of Michigan
State Attorney General
Environmental Protection Division P.O Box 30212
Lansing, Michigan 48909
Attention: Paul F. Novak, Asst. Attorney General

To: Plaintiff State of Michigan
Michigan Department of Natural Resources
Waste Management Division
P.O. Box 30241,
Lansing, Michigan 48909
Attention: Stephen Sliver

To: Defendants Michael Ladney, Production Plated Plastics, and/or Michigan City Plastics
Law, Weathers & Richardson
333 Bridge Street, N.W., Suite 800
Grand Rapids, MI 49504
Attention: Douglas W. Van Essen

To: Third-Party Trustee
The Environmental Trust Group, Inc.
131 Mount Auburn Street
Cambridge, Massachusetts 02138
Attention: Cynthia N. Stayton

Which notices shall be deemed given: if by hand, on the date of the receipt and delivery; or if by telecopy, before 5:30 p.m. on the date of the receipt of the transmission (provided that a hard copy is properly mailed the same date the telecopy is sent); or if by reliable overnight delivery service or certified mail, on the date of the first attempted delivery thereof, whether or not such delivery is accepted by the addressee; and provided that notice of change of address shall be deemed effective only upon receipt.

"Personal Effects Assets" shall mean those personal household effects that Mr. Ladney normally keeps in his primary residence and which are used by him personally on a regular basis for recreational, cultural or other non-business purposes, including household goods and appliances, reasonable cash, furniture and other personal effects.

"Plaintiffs" shall mean the United States, on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of Michigan, through

its Office of the Attorney General and on behalf of the Michigan Department of Natural Resources.

"Schedule of Selected Assets" shall mean the schedule described in 2.2 heretofore.

"Selected Assets" shall only mean those Assets which the Trustee from time to time identifies and proposes to be selected for marshalling by written notice to the Court and the parties to this Action in an effort to accumulate sufficient revenue in the Escrow Trust Fund to pay for the performance of the Work, and which the Court so approves. As appropriate, certain of the proceeds derived from the liquidation of Selected Assets shall also be deposited into the Administrative Court Registry Account.

"Trustee" shall mean The Environmental Trust Group, Inc. (or any successor Trustee subsequently appointed by the Court), as an adjunct and officer of the Court.

"Work" shall mean all activities, operations and obligations required in connection with the Richland facility under the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. § 6901, *et seq.* and the Michigan Hazardous Waste Management Act ("MHWMA"), 1979 P.A. 64, as amended, M.C.L. 299.501, *et seq.*, M.S.A. 13.30(1), *et seq.*, including the expeditious and complete closure of the hazardous waste management units at the Richland facility, as set forth in the Injunctive Relief Orders.

"Work Schedule" shall mean the detailed plan and schedule for the performance of each aspect of the "Work," as defined herein.

ARTICLE I
PURPOSE OF TRUSTEE APPOINTMENT

The Trustee has been duly appointed to assure sufficient funds are made available from the Defendants' Assets and transferred into the Escrow Trust Account and Administrative Court Registry Account (or otherwise conveyed into a funding mechanism approved by the Plaintiffs) for the purpose of funding the expeditious and complete performance of the Work, pursuant to all Injunctive Relief Orders. Without limitation, the Trustee may arrange for the liquidation of Selected Assets, review, approve, disapprove or redirect aspects of the Defendants' business or personal operations, and place sufficient cash in the Administrative Court Registry Account in order to fulfill its duties hereunder.

ARTICLE II
DUTIES: ASSETS VALUATION, LIQUIDATION AND DISTRIBUTION

2.1 *Trustee's Inventory and Valuation of Assets*: Within 90 days after entry of this Trust Memorandum, the Trustee shall endeavor to submit to the Court, the Plaintiffs and the Defendants a listing and inventory of the Assets.

(a) In the inventory, the Trustee shall endeavor to delineate (1) whether an Asset can primarily be categorized as relating to the business affairs and operations of the Defendants; or (2) whether such Asset is a personal asset of the Defendant Michael Ladney.

(b) The Trustee shall: (1) endeavor to estimate and assign a fair market value, or range of values (if appropriate), for some or all of the Assets, including Selected

Assets, based on information made available by the Defendants, information provided by third-party professionals or any other reliable source; (2) indicate the relevant time period for which such valuations may be applicable; and (3) include all such values in the listing and inventory submitted to the Court and the parties, as set forth in 2.1.

(c) The Trustee makes no warranties, representations or other guarantees with respect to such inventory and/or values and may rely upon information supplied by the Defendants or third-party professionals.

(d) If information later comes to the Trustee's attention which indicates that significant changes in the inventory and corresponding values are justified, then, within a reasonable time period, the Trustee shall summarize such information and submit a revised inventory, with corresponding values, to the Court, the Plaintiffs and the Defendants. At that time, the Trustee shall present a written explanation of the reason for such changes.

2.2 *Schedule of Selected Assets*:

(a) Within 45 days of its submittal of the inventory and valuation of Assets, the Trustee shall also endeavor to submit a Schedule of Selected Assets for approval by the Court. The Schedule of Selected Assets shall only include Assets which were previously included on the listing and inventory of Assets compiled by the Trustee pursuant to Section 2.1. above. This Schedule will identify for the Court those specific Selected Assets that the Trustee intends to marshall and liquidate in order to generate revenues sufficient to finance the expeditious and complete performance of the Work in accordance

with the Work Schedule and Funding Plan, as described below in Section 2.3. From time to time the Trustee may modify the Schedule of Selected Assets by adding or deleting specific items from the Schedule. Where the Trustee has deleted such Selected Assets from the Schedule, the Trustee shall have no further responsibility for such Selected Assets.

(b) The Defendants shall have ten (10) business days from receipt of the Schedule of Selected Assets or any modifications to such Schedule, to object to the inclusion or exclusion of any Selected Asset or to its assigned valuation. Failure of the Defendants to so object, or a Court ruling against the Defendants on the matter, constitutes a waiver of Defendants' right to challenge the Trustee's recommendation for any such Selected Asset to be marshalled and liquidated.

2.3 *Defendants' Work Schedule and Funding Plan:*

(a) Not more than 45 days after entry of this Trust Memorandum, the Defendants shall submit to the Court, the Trustee and the Plaintiffs the "Work Schedule" and "Funding Plan," described below.

(1) *Work Schedule:* A detailed schedule for the performance of each aspect of remaining Work needed to achieve expeditious completion of all of the Work ("Work Schedule");

(2) *Funding Plan:* A detailed "Funding Plan" that identifies the needed level of Funds and their proposed source (*e.g.*, the particular Selected Assets to be liquidated) that would provide an adequate amount of capital for completing the respective Work components.

(3) Any changes to the Work Schedule and/or Funding Plan must be submitted to Plaintiff State of Michigan for approval in consultation with the Trustee and must be certified by Plaintiff State of Michigan as approved.

(b) The Trustee shall review the Defendants, proposed Work Schedule and Funding Plan to assess their feasibility or impact upon financing the measures set forth therein. After its review of the Work Schedule and Funding Plan, the Plaintiff State of Michigan shall notify the Court, the Trustee and the other parties in writing whether it approves, approves with modifications or rejects the Work Schedule and Funding Plan. It shall endeavor to explain the basis for each modification and rejection. If either submission is rejected, the Defendants shall have twenty-one (21) days in which to submit an approvable revised Work Schedule or Funding Plan.

(c) In its review, the State shall endeavor to establish, without limitation, whether the Defendants' cost estimates, Work component descriptions and Work Schedule set forth in Section 2.3(a)(1-2) are reasonable and accurate, based on available information and in light of the need to minimize delays in the expeditious completion of each Work component. In its review, the Trustee shall endeavor to assess the feasibility of financing the measures set forth therein. When approved by the Plaintiff State of Michigan, in consultation with the Trustee, the Work Schedule and Funding Plan shall establish the projected timing and particulars of the Defendants' compliance with the Injunctive Relief Orders.

(d) If the Defendants fail to comply timely with any obligation set forth above in this Section, then:

(1) Plaintiff State of Michigan shall so notify the Court, the Plaintiff United States, the Defendants and the Trustee.

(2) At either Plaintiff's request, the Trustee may marshall and liquidate Selected Assets in order to finance the development of the Work Schedule and Funding Plan by Plaintiff State of Michigan.

(3) The State may then submit for Court approval the Work Schedule and Funding Plan prepared by it, based on consultation with the Trustee, the United States, the Defendants or their contractor(s). As approved by the Court, this shall serve as the Work Schedule and Funding Plan.

2.4 *Trustee's Professional Liability Coverage*: Concurrent with the entry of this Trust Memorandum, professional liability insurance concerning the effect of misfeasance, nonfeasance or malfeasance, shall be secured and maintained for the duration of the Trustee's tenure. Such insurance shall be secured in accordance with either subparagraph (a) or (b) below:

(a) Upon entry of this Trust Memorandum, the Trustee shall secure and maintain professional liability coverage in an amount of not less than $3,000,000 per claim, and an aggregate of $3,000,000 per year, subject to conditions of availability.

(b) In the alternative, within ten (10) days after entry of this Trust Memorandum, the Defendants may purchase such professional liability insurance in the

amounts set forth above in subparagraph (a), provided that the Environmental Trust Group Inc. is named as the insured party with respect to the performance of its duties as Trustee in this matter. The Defendants may only purchase such insurance if (i) the Trustee reviews and approves the proposed insurance coverage in advance and in writing; and (ii) the policy recites that it cannot be terminated or amended without at least thirty (30) days prior written notice to and written approval by the Trustee. If professional liability insurance is not timely obtained in accordance with this subparagraph, the Trustee is authorized to obtain insurance directly in accordance with subparagraph (a) above.

Any insurance coverage obtained under this Section 2.4 shall include an option for an extension of the insurance policy beyond the termination of the Trustee's tenure, subject to conditions of availability.

2.5 *Judicial passage of title*: Where the Defendants do not fully cooperate with the Trustee regarding arrangements for transfer, conveyance/liquidation or other alienation of a Selected Asset(s), the Trustee may seek prior Court approval or authorization to effect a conveyance from the Defendants. An Order of the Court authorizing the direct passage of title (*e.g.*, to purchasers) shall constitute judicial passage of title.

2.6 *Distribution of Proceeds from Marshalling of Selected Assets:* After retaining in the Administrative Court Registry Account sufficient proceeds from the marshalling of Selected Assets to fund the Trustee's Funding Call, the Trustee shall deposit all other proceeds into the Escrow Trust Fund. Withdrawal of funds from the Escrow Trust

Fund shall be subject to the prior approval of the Plaintiff State of Michigan, in consultation with the United States.

(a) The Defendants may withdraw funds from the Escrow Trust Fund solely for the performance of the Work consistent with the approved Work Schedule and Funding Plan, and only after all of the following conditions have been satisfied:

(1) prior written notice to the Plaintiffs, Trustee and the Court at least 30 days prior to the date on which the Defendants intend to seek to withdraw such funds;

(2) Plaintiff State of Michigan's consultation with the Trustee as to whether such proposed withdrawal would adversely affect the adequate funding of the Administrative Court Registry Account. The Trustee shall have not less than 15 days from the receipt of such request for withdrawal to so advise the Court and the parties; and

(3) Plaintiff State of Michigan's prior written approval or conditional approval of such withdrawal, as well as its concurrent certification to the Trustee and the Court that it approves of any requested amount for withdrawal which deviates from the Funding Plan, or its written explanation as to any disapproval of such a request for withdrawal within 30 days after the State receives the Defendants' request.

(b) After so notifying the Court, the Trustee and other parties, the Plaintiff State of Michigan may withdraw funds from the Escrow Trust Fund for the performance of the Work following a determination by the State of Michigan, or its authorized representative, that the

Defendants have failed: (1) to request withdrawal for their performance of the Work consistent with the approved Work Schedule and Funding Plan; (2) to perform the Work to the satisfaction of Plaintiff State of Michigan; (3) to receive approval for requested withdrawal from Plaintiff State of Michigan; or (4) otherwise to come into complete compliance with all aspects of the Injunctive Relief Orders or any other aspect of this Trust Memorandum.

(c) Subject to the provisions set forth below in Article IV, the Trustee may withdraw funds from the Escrow Trust Fund for deposit into the Administrative Court Registry Account. In such an event, notice must be provided to all parties within five (5) business days of such a transfer.

(d) Either Plaintiff may withdraw funds from the Escrow Trust Fund for repayment of any advances made to the Administrative Court Registry Account, provided that such Plaintiff first consults with the Trustee and its co-Plaintiff. In such an event, notice must be provided to all parties within five (5) business days of such a transfer.

(e) If the Court terminates the appointment of the Trustee because sufficient funds have been deposited into the Escrow Trust Fund, as a precondition of the termination, the Plaintiff State of Michigan may arrange for the transfer of any remaining in the Escrow Trust Fund or the Administrative Court Registry Account (*e.g.*, after deducting appropriate payment for the Trustee's services) into a long-term trust established and maintained by the State on the Defendants' behalf, for purposes of assuring the Defendants' compliance with MWHMA regulations.

(f) After the State has certified that all remaining Work has been completed, and all Trustee expenses have been paid, including for any advances made by either Plaintiff, all accounts remaining from the liquidation of Selected Assets may be paid to the Defendants.

2.7 *Termination of Appointment of Third-Party Trustee*: When the Trustee determines that its duties have been fulfilled, the Trustee shall so notify the Court and the parties, and submit its final financial statement pursuant to Section 4.5 below. If the Court concurs that the purpose of the Trustee's appointment has been met, and the Plaintiffs do not object to such a finding by the Court, the appointment of the Trustee shall terminate upon:

(a) the Court's concurrence with the Trustee's final financial statement, and a corresponding order directing payment by the Defendants;

(b) arrangement for transfer of all funds remaining in the Escrow Trust Fund and Administrative Court Registry Account; and

(c) an Order of the Court that all Trustee obligations, rights, powers and duties as set forth in this Memorandum and related documents entered in the Court shall also be terminated, except those that expressly survive such termination, if any.

ARTICLE III
TRUSTEE'S POWERS

3.1 *Powers Vested in Trustee*: Consistent with applicable law and without limitation, the Trustee is authorized to receive, discover, marshall, preserve, continue, license,

subdivide, take control of, manage, mortgage, operate, sell, refinance, protect, liquidate, dispose, and lease any Selected Asset, as the Trustee deems necessary to satisfy its obligations hereunder. This authority includes, without limitation and as exercised in a manner consistent with applicable law (*e.g.*, state or federal law);

(a) Tracing all of the Defendants' assets, commencing causes of action, purchasing insurance, selling or taking control over defendants Selected Assets, buying and selling merchandise, supplies or stock in trade for cash or on credit, making payments and disbursements for the preservation of any Selected Asset (without obligation to do so) and incurring expenses on behalf of any Selected Asset.

(b) To the extent that a Defendant directly or indirectly oversees or exercises control over any business, partnership, or other entity, including, without limitation, the revenue thereof, then at the Trustee's election, it shall be accorded the same rights, benefits and privileges that the defendant directly or indirectly exercises with respect thereto.

(c) Controlling revenues from and overseeing operation of a Selected Asset, insofar as such control and oversight are designed to yield, or prevent dissipation of revenues, cash or other assets which may be liquidated for cash, including but not limited to:

(1) imposing limits on the form and amount of working capital the Defendants may invest in ongoing or new business operations or investment opportunities to enhance current or future market value or profitability, and using such capital to satisfy the Funding Plan;

(2) making arrangements for the sale, lease, licensing or other alienation of products, technologies, equipment and/or businesses;

(3) making arrangements for re-structuring of the Selected Assets of certain business operations to release, marshall or yield cash for the purpose of satisfying the Funding Schedule for Compliance; and

(4) assessing and, as appropriate, modifying financial commitments of the Defendants to any entity.

Prior to taking any substantive action with respect to a Selected Asset, the Trustee shall provide not less than 20 days notice to Defendants, Plaintiffs and Court. Any Defendants' objection to the Trustee's actions or intended actions must be given by written Notice to the Trustee. Failure of the Defendants to object to such action or intended action by the Trustee shall constitute consent to the action and a waiver of further rights to object to such action.

(d) Making arrangements for the sale, lease, disposition and liquidation of some or all real property Selected Assets, including, but not limited to: (1) determining the property value; (2) marketing as necessary; (3) subdividing such real property Selected Assets to improve the prospects for sale; and (4) negotiating all terms and conditions attendant to any statement of intent or purchase and sale agreements with any lessee or bona fide buyer(s) for such real property Selected Assets.

3.2 *Access to Assets*: The Trustee shall have access upon reasonable notice to all present or former place(s) of business operations, files, records, property, Assets and

financial records under the control of the defendants, whether deemed confidential or non-confidential, business or personal. Any actions on the part of the Defendants to obstruct or otherwise impair such access by the Trustee shall constitute a violation of this Trust Memorandum. The Trustee's use of a sheriff or marshal (*e.g.*, to assure that its access to such places, property, files, records and other materials) shall comport with standard access and discovery practices. Claims that information is subject to an attorney-client privilege shall be addressed as provided in the Order Designating a Third-Party Trustee.

3.3 *Right to Liquidate Selected Assets At Lower Value*: If the Trustee anticipates a need for cash in the Administrative Court Registry Account or Escrow Trust Fund in order to satisfy the Funding Plan, the Trustee may, consistent with applicable state or federal law:

(a) after receiving approval, liquidate Selected Assets for a lower value than might otherwise be realized under fair or prevailing market conditions, and the Trustee shall have no liability to any party, including the defendants, for such action;

(b) liquidate an Asset, after providing adequate notice under the circumstances to all parties, prior to completing the inventorying and valuation process set forth in Section 2.1, or submitting the Schedule of Selected Assets as set forth in Section 2.2, above. The Trustee may use initial operating funds, to the extent available, to fund its expenses associated with such liquidation activities.

3.4 *Right to Liquidate Personal Selected Assets*: With the prior authorization of the Court, the Trustee may liquidate any Selected Asset that is a "personal asset," pursuant to Section 2.1.a above.

3.5 *Right to Retain Professionals*: The Trustee may employ third-party professionals (*e.g.*, an attorney, accountant, engineer, surveyor, contractor, investment counsel, real estate broker or others) as needed to fulfill its duties under this Trust Memorandum. All professionals shall be paid out of funds held in the Administrative Court Registry Account.

ARTICLE IV
TRUST ADMINISTRATION

4.1 *Initial Operating Funds*: Within five (5) days of entry of the Trust Memorandum, the Defendants shall provide initial operating funds in the amount of $25,000 for deposit in the Administrative Court Registry Account, to fund the Trustee's initial activities and costs.

(a) Funds needed to pay professional liability insurance premiums for the Trustee are not included in the Initial Operating Fund. The Defendants shall fund such insurance premiums within five (5) days of receiving an invoice concerning them from the Trustee.

(b) If the Defendants fail to deposit any or all of the initial operating funds, or funds required in Section 4.1(a) above, the Trustee shall so notify the Court and the parties. At their discretion, either Plaintiff may advance such funds to the Trustee, including such funding advanced prior to entry of this Trust Memorandum, on

terms that the plaintiffs deem acceptable. The advance shall be repaid from the Escrow Trust Fund and/or the Administrative Court Registry Account, at the depositing Plaintiff's option.

4.2 *Payment of Trustee Expenses*: Within thirty (30) days following the deposit of the initial operating funds and funds for payment of insurance premiums, the Trustee shall submit to the Defendants, the Plaintiffs and the Court an estimate of its costs associated with fulfilling its responsibilities under this Trust Memorandum for the next succeeding calendar quarter. Thirty (30) days prior to each calendar quarter thereafter, the Trustee shall submit a Funding Call for each next succeeding calendar quarter.

(a) The Trustee's Funding Call shall include a written explanation of the purpose and need for such funds.

(b) The Trustee shall establish an Administrative Court Registry Account with the Court. The Account shall be used to receive, hold, earn interest on and disburse to the Trustee its administrative funds needed for the performance of its duties. Absent any objection from the Defendants, as set forth below, and within fifteen (15) days after receipt of the Trustee's quarterly Funding Call, the Clerk of the Court shall disburse to the Trustee the amount needed by the Trustee to continue performance of its duties for the next succeeding calendar quarter, which shall be set forth in said Funding Call.

(c) Any quarterly funding excess or shortfall, as determined pursuant to Section 4.4 below, shall be reflected in the Trustee's Funding Call for the next succeeding calendar quarter.

(d) Within 10 days of their receipt of the Trustee's Funding Call, the parties may notify the Trustee in writing of any objections or concerns regarding such Funding Call. The Trustee shall have five (5) days to provide its written response. If the Trustee's response does not satisfy the objections or concerns of the objecting party, the Clerk shall not disburse the requested funds and that party shall immediately seek an expedited ruling from the Court to resolve any such objections or concerns. Objections that are limited to particular costs or items shall not delay the funding of other costs or items.

(e) If the Trustee determines that delays caused by such objections or concerns would cause it to incur any financial risk, it may so notify the Court and suspend the performance of its duties until the matter is resolved.

(f) If at any time the Trustee determines that it does not possess sufficient funding to carry out any of its required duties or otherwise to satisfy the Work Plan or the Funding Plan, and it believes that the funding procedures specified in Sections 4.1 or 4.2 herein would not result in timely receipt of necessary funds, the Trustee shall simultaneously notify the Court and all parties of the amount of funds needed, the purposes therefor, and the urgency. The Defendants shall respond to such notice from the Trustee within five (5) days of receipt with copies to the Plaintiffs and the Court. If the Trustee's requested funds are not forthcoming, it may request an expedited resolution of this matter by the Court and, if it deems necessary, suspend the performance of its duties hereunder until the matter is resolved.

(g) Any actions by any Defendant in bad faith or without substantial merit to withhold funds from the Trustee, obstruct the Trustee's reasonable efforts to obtain reimbursement or otherwise impede the Trustee's payment of a Funding Call or otherwise shall constitute a violation of this Trust Memorandum and shall subject the Defendants and entities described in Fed. R. Civ. P. 65(d) to sanctions.

4.3 *Trustee Compensation*: The Trustee shall file monthly bills. Each shall include an itemization of hourly fees, pursuant to the rate structure set forth in Attachment A hereto, charged for the preceding month and expenses relating to overhead for normal operating procedures (*e.g.*, telephone calls and administrative assistance). The procedures set forth in Section 4.2(b-g) apply to this Section governing Trustee compensation as well, with the exception that the Trustee's monthly fees are not to be paid in advance. In no event, however, shall costs that the Trustee has incurred and which this Court has approved remain unpaid, and the Trustee is not expected to risk nonpayment in performing its duties hereunder.

4.4 *Trustee Ongoing Reporting Requirements*: Following the performance of its duties, rights and obligations for which the Initial Operating Funds are to be utilized, and within thirty (30) days after the end of each calendar quarter thereafter, the Trustee shall prepare, or otherwise direct a Certified Public Accountant to prepare, a financial report detailing its disbursements, receipts, accounts payable and funding receipts. These financial reports shall be submitted to the Defendants, the Plaintiffs, and the Court. The Trustee shall be notified of any objections or concerns regarding such financial reports in writing

within 15 days following the Trustee's submittal of it [sic] report. The Trustee shall endeavor to respond to any such notices within 15 days thereafter. If the objecting party is not satisfied, that party may seek an expedited ruling from the Court to resolve any such objections or concerns. Absent a timely objection, the financial report shall be deemed accepted in all respects.

4.5 *Trustee's Final Reporting Requirements*: At such time as the Trustee notifies the Court and the parties that it has satisfied its obligations the Trustee, or if the Trustee seeks to resign as set forth above in Section 2.7, the Trustee shall direct a Certified Public Accountant to prepare and submit to the Court an audited financial statement in accordance with generally accepted accounting principles of all Trustee activities.

(a) Any outstanding balances owed to the Trustee shall be paid to the Trustee from the Administrative Court Registry Account or the Escrow Trust Fund or by the Defendants within 15 days of the filing of the audited financial statement.

(b) Any outstanding balances remaining in the Administrative Court Registry Account or Escrow Trust Fund shall be placed in a long-term "Act 64" Trust Fund that the State of Michigan maintains to implement MHWMA regulations.

(c) If no further Work needs to be performed, and if the Trustee's accounts have been fully paid and the Plaintiffs' advances have been fully repaid, then accounts remaining from the liquidation of Selected Assets may be paid to the Defendants.

4.6 *Successor Trustee*: The Trustee may resign at any time by giving not less than 30 days written notice to the Court, with copies to the parties, and the Defendants shall fully reimburse the Trustee consistent with Section 4.1 above. Such resignation shall take effect upon the day specified in such notice, unless a successor Trustee shall have been appointed sooner as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of a successor Trustee. If any individual Trustee becomes mentally or physically unable to serve, a successor Trustee shall be appointed.

ARTICLE V
CONDITIONS OF TRUSTEE OBLIGATIONS

5.1 *Limitation of Liability*: In no event shall the Trustee be liable to any of the Defendants or any other person or entity, except for its negligence, bad faith, criminal or willful misconduct, subject to the requirements of 28 U.S.C. § 959.

5.2 *Reliance on Documentation*: The Trustee may rely on the accuracy, completeness, clarity and all other representations (express or implied, written or oral) by the Defendants with respect to any information used, provided by or otherwise relied upon by the Trustee in the performance of its duties. The Trustee may reasonably rely on the accuracy, completeness, clarity and all other professional representations (express or implied, written or oral) by any third parties or entities. Accordingly, the Trustee shall be protected in acting in reliance on any

instrument, document or agreement and shall be indemnified and held harmless by the Defendants for so doing as set forth in Section 5.1 above.

5.3 *Limitation of Financial Liability*: No provision of the Trust Memorandum shall require the Trustee to expend or risk its own funds or otherwise incur any potential financial expense, indebtedness or obligation in performing its duties, administering the Trust or exercising its powers set forth herein. The source of recovery for any claim against the Trustee for which no insurance coverage is available (*e.g.*, professional liability coverage under Section 2.4 has terminated or no insurance policy applies for such a claim) shall be the Assets.

5.4 *Standard for Performance of Trustee's Duties*:

(a) The Trustee shall have no liability to the Defendants, except under applicable law.

(b) No purchaser, transferee, pledger, mortgagee or other lender person shall be under any obligation to see to the application of the purchase money or of any money or property loaned or delivered to the Trustee, or to see that the terms and conditions of this Trust Memorandum have been fulfilled. Every agreement, lease, deed, mortgage note or other instrument or document executed or action taken by the Trustee shall be conclusive evidence in favor of every person relying thereon or claiming thereunder that at the time of the delivery thereof, or the taking of such action, this Trust Memorandum was in full force and effect, that the execution, and delivery thereof or taking of such action was duly authorized, empowered and directed by this Court, and that such instrument or

document or action is valid, binding and legally enforceable. Any person dealing with the Trustee may always rely without inquiry on a certificate signed by the Trustee as aforesaid as to who is the Trustee, or as to the authority of the Trustee to act, or as to the existence or non-existence of any fact or facts which constitute conditions precedent to acts by the Trustee or which are in any other manner germane to the affairs of the Trustee.

(c) Except as provided under applicable law, officers, directors, employees, shareholders or agents of the Trustee, or an individual serving as a Trustee, shall not be held personally liable for any of the obligations incurred or entered into in its capacity as a trustee or receiver.

ARTICLE VI
COMPLIANCE OBLIGATIONS AND EFFECT OF NONCOMPLIANCE

6.1 *Compliance Obligation of Defendants*: The Defendants have been and are instructed and directed to comply and cooperate with the Trustee in the performance of its duties hereunder, and to do all things appropriate in order to facilitate the Trustee's performance of its duties.

6.2 *Non-compliance*: The need for the relief set forth in the Post-Trial Order and this Trust Memorandum results exclusively from defendants' non-compliance with prior Orders of the Court. Any non-compliance by the Defendants (*e.g*, with this Trust Memorandum), may subject the Defendants to the power of contempt and the authority of the Court to assess further penalties pursuant to 42 U.S.C. § 6928. The entry of this Trust Memorandum is without prejudice to the Plaintiffs, or the Trustee's seeking further

relief from this Court, including an expansion of the Trustee's powers.

6.3 *Modification*: This Trust Memorandum may be modified upon subsequent application of Plaintiffs, the Defendants or the Trustee to the Court.

6.4 *Communication*: The Trustee, its employees and agents shall make reasonable efforts to coordinate all communications with the Defendants and their employees, agents or officers, through defense counsel identified in this document.

December 10, 1993
DATE

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
UNITED STATES
DISTRICT COURT
JUDGE

ATTACHMENT A

THE ENVIRONMENTAL TRUST GROUP, INC.
131 MOUNT AUBURN STREET
CAMBRIDGE, MASSACHUSETTS 02138

RATE STRUCTURE & SCHEDULE
PROFESSIONAL SERVICES:

STAFF PROFESSIONALS:	HOURLY RATES:
Cynthia N. Stayton:	$200.00/hr
Lavea Brachman:	$150.00/hr
Katharine Keene:	$ 90.00/hr
Amy Baltzel:	$ 60.00/hr

OTHER PROFESSIONAL SERVICES:

	Customary Hourly Rate
Other Staff Professionals:	
Research & Administrative Service:	$ 40.00/hr
Secretarial/Clerical:	$ 20.00/hr

NOTE:

(1) ABOVE RATES ARE EFFECTIVE FOR CALENDAR YEAR 1993 & MAY BE SUBJECT TO ANNUAL REVIEW AND ADJUSTMENT.

(2) RELATED EXPENSES (TRAVEL, MAILINGS, TELEPHONE, COPYING, FACSIMILE, ETC.) WILL BE BILLED AT DIRECT COSTS (WITHOUT MARKUP) OR AT STANDARD RATES.

DATE: December 10, 1993 /s/ Benjamin F. Gibson
Benjamin F. Gibson
U.S. District Judge